92-1479

No. _____

In The

Supreme Court of the United States

October Term, 1992

McDERMOTT, INC.,

Petitioner,

vs.

AmCLYDE, A DIVISION OF AMCA INTERNATIONAL, INC. and RIVER DON CASTINGS, LTD.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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107 pp

QUESTIONS PRESENTED

1. Should a plaintiff in a maritime case who settled with three of five defendants be penalized and defendants who forced the matter to trial be rewarded by the Court of Appeals' deduction of both the full dollar amount of the settlement *and* the settling defendants' proportionate share of liability from plaintiff's judgment.

2. In United States maritime law, when there is catastrophic, physical damage to both the "product itself" and to "other property" due to a defective or unreasonably dangerous condition, is the injured party entitled to pursue recovery of its entire damages, physical and economic, caused thereby in tort/products liability.

3. Should obedience to a trial court's order not to present an entire class of damages to the jury, followed by plaintiff's duly accepted proffer of its evidence of such damages, result in a total denial of due process by the Court of Appeals because its panel simply, mistakenly failed to notice the proffered evidence in the record.

LIST OF PARTIES

Parties to the proceedings below were the petitioner McDermott, Inc., the respondents AmClyde, a division of AMCA International, Inc. (formerly "Clyde Iron"), River Don Castings, Ltd., and defendants British Ropes, Ltd., International Southwest Slings, Inc., and Hendrik Veder, B.V.

RULE 28.1 LIST

The parent corporation of McDermott Incorporated is McDermott International, Inc.

Subsidiaries, Affiliates and Partnerships of McDermott International, Inc. (Excluding Wholly-Owned Subsidiaries)

Davy McDermott Ltd.
Initec, Astano Y McDermott International Inc., S.A.
Malmac Sdn. Bhd.
McDermott Arabia Company Ltd.
McDermott-ETPM, Inc.
P.T. McDermott Indonesia
McDermott Incorporated
B&W Mexicana, S.A. de C.V.
Babcock & Wilcox Beijing Company, Ltd.
Diamond Power Hubei Company Ltd.
Babcock & Wilcox Gama Kazan Teknolojisi Anonim Sirketi
Thermax Babcock & Wilcox Private Ltd.
Hudson Northern Industries, Inc.
Rotovent S.A. de C.V.
Diamond Power (Australia) Pty. Limited
Halley & Mellowes Pty. Ltd.
Heerema-McDermott (Aust.) Pty. Ltd.
HeereMac
Panama Offshore Chartering Company, Inc.
McDermott (Nigeria) Limited
McDermott Scotland Limited
MMC – McDermott Engineering Sdn. Berhad
P.T. Babcock & Wilcox Indonesia
P.T. Bataves Fabrications

RULE 28.1 LIST – Continued

Topside Contractors of Newfoundland, Ltd.
Arabian Petroleum Marine Construction Company
DB/McDermott Company
Abahsain Hudson Heat Transfer Co. Ltd.
Construcciones Maritimas Mexicanas, S.A. de C.V.
ASEA Babcock PFBC
B&W Fuel Company
B&W Nuclear Service Company
Babcock-Ultrapower Jonesboro
Babcock-Ultrapower West Enfield
Diamond Power Specialty Limited
Espacialidades Termomecanicas S.A. de C.V.
Babcock & Wilcox Services, Inc.
KBW Gasification Systems, Inc.
North American CWF Partnership
Palm Beach Energy Associates
Maine Power Services
PowerSafety International, Inc.
South Point CWF

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, McDermott, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on 11 December 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 979 F.2d 1068 (5th Cir. 1992), and is reprinted in the Appendix, p. A-1, *infra*. The denial of

petitioner's request for rehearing en banc, also treated as a request for panel rehearing, is reprinted in the Appendix, p. A-33, *infra*. The verdict, memoranda decisions, and judgments of the United States District Court for the Southern District of Texas (Houston Division) (U.S. Magistrate Judge George A. Kelt, Jr.) are not reported. They are reprinted in the Appendix, pp. A-35-58, *infra*.

JURISDICTION

Petitioner invoked federal jurisdiction under 28 U.S.C. §§ 1332 and 1333, bringing suit in the U.S. District Court for the Southern District of Texas, Houston Division. A jury trial was held 13 November – 17 December 1990. At the outset of trial the court, under the rubric of respondent AmClyde's Motion in Limine, denied *in toto* McDermott's claims for damage to the Shearleg Crane and ordered that no evidence or argument thereon would be permitted. Also at the outset of trial, a sixty-day order of dismissal was entered on plaintiff's settlement of all claims against defendants, British Ropes, Ltd., International Southwest Slings, Inc., and Hendrik Veder, B.V. (hereinafter referred to as "sling defendants").

After trial, the court considered briefing and held a hearing on AmClyde and River Don Castings, Ltd.'s Motion for Credit for the sling defendants' settlement. The court duly denied AmClyde and River Don's motion for a "*Hernandez*" credit and entered judgment on the verdict 17 January 1991. Petitioner and Respondents each sought relief from adverse aspects of the judgment under Federal Rules of Civil Procedure 50 and 59, which was

denied and a "Superseding Final Judgment" entered 14 March 1991.

Petitioner and Respondents filed timely Notices of Appeal and prosecuted their appeal and cross-appeal to the Court of Appeals for the Fifth Circuit. On 11 December 1992, the panel opinion of the Court of Appeals was filed. Petitioner applied for rehearing en banc, which, along with panel rehearing, was denied.

The jurisdiction of this Court to review the judgment of the Court of Appeals for the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

All statutes involved are referenced in the "Jurisdiction" section, *supra*.

STATEMENT OF THE CASE

McDermott, Inc. filed a complaint with jury demand on 18 July 1988 in the Southern District of Texas, Houston Division. Named defendants and served were River Don Castings, Ltd., Clyde Iron, a Division of AMCA International (later known as AmClyde), International Southwest Slings, Inc. (hereinafter, "ISSI"), and British Ropes, Ltd. The complaint was amended to add defendant Hendrik Veder B.V. 3 May 1989 and Clyde Iron filed its cross-claim for contribution and indemnity against all other defendants 4 May 1989.

AmClyde filed a motion for partial summary judgment, seeking dismissal of McDermott's tort/products liability claims against it on 25 September 1989. AmClyde then filed a third party complaint against Hudson Engineering, Inc., a sister company of McDermott, Inc., and a counter-claim against McDermott for the cost of AmClyde's warranty replacement of the Shearleg Crane's defective, broken main hook, 19 October 1989. AmClyde's Motion for Partial Summary Judgment was denied on 28 December 1989.

On 28 August 1990, pursuant to the parties' consent, the entire case was referred to Magistrate Judge Kelt to conduct all further proceedings, through trial and entry of final judgment.

AmClyde, in a coordinated effort by defendants, moved for reconsideration of its previously denied Motion for Partial Summary Judgment, while the "sling defendants," British Ropes, ISSI, and Hendrik Veder also filed a Motion for Partial Summary Judgment, all on 14 September 1990. Said motions were duly opposed by McDermott and plaintiff countered with its own Motion for Partial Summary Judgment against AmClyde on 17 October 1990.

There is no express ruling on these motions in the record, though convening trial indicated their denial. Plaintiff and the three "sling defendants" reached a settlement, the day before trial, of McDermott's claims against them, for damage to both the SNAPPER deck and the Shearleg Crane, in exchange for one million dollars, to be paid within sixty days.

Trial began 13 November 1990. That morning, defendants AmClyde and River Don announced that they had entered into a settlement whereby they would join their defense under one counsel, that previously of AmClyde, alone. AmClyde also reurged the substance of its previously denied Motions for Partial Summary Judgment in a Motion in Limine, as well, as arguments that the SNAPPER deck was not "other property," seeking entry of judgment absolving AmClyde of all liability. The court, in part, granted summary judgment on AmClyde's motion, and extended it to River Don, denying McDermott any recovery against them, whether in tort or contract/warranty, for damages to the Shearleg Crane. Record excerpts reflecting the trial court's ruling, amounting to a summary judgment, are included in the Appendix, pp. A-40-49. McDermott stipulated, by virtue of its settlement with the sling defendants, that it accepted responsibility for any damages which the jury found were caused by the sling's failure. AmClyde abandoned its cross-claims. The trial went forward to the jury, therefore, solely on the issues of liability and damages to the SNAPPER deck and AmClyde's counter claim for the cost of replacing the defective hook.

McDermott objected to and sought reconsideration of the trial court's preclusion of its case for damages to the Shearleg Crane under both tort and contract prongs of *East River*. Upon denial of reconsideration, at the outset of trial, 14 November 1990, and at the close of its case, 6 December 1990, McDermott proffered the evidence of its Shearleg Crane damages. A summary of these damages,

proffered for the trial record, is reproduced in the Appendix with the summary of "deck" damages actually admitted in evidence at pp. A-66-67.

The jury returned its verdict, 7 December 1990, finding AmClyde 32% liable, River Don, 38% liable, and "McDermott/Sling defendants" 30% liable for the accident. The jury apportioned causation rather than fault, due to the combination of warranty, tort, and strict liability theories of liability presented. No liability was attributed to Hudson Engineering on AmClyde's third party demand and the jury found against AmClyde and in favor of McDermott, denying AmClyde's counterclaim for the cost of the replacement hook. The jury found McDermott's damages, solely to the SNAPPER deck, to be $2,100,000.

The trial court withheld judgment to consider AmClyde and River Don's request for credit from the plaintiff's settlement with the sling defendants. The trial court duly denied defendants' motion for a "dollar for dollar" credit from the sling defendants' settlement and entered judgment on the verdict dividing damages in accordance with the jury's allocation of liability: $672,000 against AmClyde, $798,000 against River Don, and deducting $630,000 reflecting the combined contribution to the accident of McDermott, Inc. and the "sling defendants;" and awarded McDermott its costs as prevailing party.

Plaintiff and Defendants filed timely motions for new trial, judgment notwithstanding the verdict, and/or to alter or amend the judgment. Defendants' Motion for judgment N.O.V. and for new trial was denied 13 March

1991. Plaintiff's Motion for Post-Judgment Relief was denied 14 March 1991 and final judgment entered. McDermott and defendants, AmClyde and River Don, filed timely notices of appeal to the Court of Appeals for the Fifth Circuit.

AmClyde and River Don, designated appellants/cross-appellees in the Fifth Circuit and McDermott, as appellee/cross-appellant duly prosecuted their appeals and the Fifth Circuit rendered its opinion 11 December 1992. McDermott prevailed on appeal in that it was awarded a money judgment, albeit reduced to $470,000.00, against River Don. However, McDermott's verdict and judgment against AmClyde were summarily vacated, denying all recovery under tort or contract theories. The Fifth Circuit also refused to notice a box-full of proffered evidence in the record of McDermott's Shearleg Crane damages, and denied McDermott its right to present this evidence to a jury. McDermott timely petitioned the Fifth Circuit for rehearing en banc.

The Fifth Circuit, treating McDermott's petition for rehearing en banc as one for panel rehearing, denied same. Rehearing en banc was also denied, all by Order dated 25 January 1993. McDermott submits this application for writ of certiorari to review the Fifth Circuit's ruling herein within ninety days from filing of the Court of Appeals' decision.

STATEMENT OF FACTS

McDermott, Inc. was supplied a marine heavy lift crane with a warranted capacity of 5000 short tons plus ten percent impact load by Clyde Iron (now "AmClyde") at a cost of approximately $7 million. The crane's self-stowing design led to its nomination as the "Shearleg" crane. On 10 October 1986, the Shearleg Crane, mounted aboard McDermott's preexisting barge, the Intermac 600 (hereinafter "I600"), was attempting its first offshore lift: an approximately 4100 short ton oil and gas production platform called the "SNAPPER deck", which McDermott had built and was to install for its client on a structural steel base, known as a "jacket", affixed to the floor of the Gulf of Mexico, off the Texas coast, East Breaks block 165. Shortly after the Shearleg crane lifted the SNAPPER deck from its transport barge, one huge prong of the Shearleg's main hook broke off and plummeted down into the top of the SNAPPER deck. An eleven inch diameter, steel cable-laid sling then immediately unraveled at its "eye-splice," dropping half the 4100 ton deck down onto its transport barge and causing it to sway, striking the boom of the Shearleg crane. The shock of these sudden, massive load shifts wrought havoc with the stability of the I600, the SNAPPER deck's transport barge, and the integrity of the crane's heavily loaded cable reeving. Over one hundred people, including an AmClyde representative, were aboard the I600 at the time of this incident, all of whom were in easy striking distance of snapping steel cables or collapsing steel components. Most of the I600's passengers ran away from the working end of the crane boom. At least one person was injured in the rush. Fortunately, McDermott's crane operator suppressed panic

and immediately began to lower the part of the SNAPPER deck still dangling from the remains of the hook, thus relieving the tension on the crane and averting further disaster.

The Shearleg Crane and SNAPPER deck were towed back to McDermott's fabrication facilities for repairs. McDermott was obligated to deliver the SNAPPER deck, installed and fully operational on a tight schedule. Therefore, McDermott had to contract with its primary competitor to lift and set the SNAPPER deck at a cost, for the lifting services alone, of approximately $300,000.00. McDermott accomplished the repairs to the SNAPPER deck, set it on location, and delivered it to its client.

The Shearleg Crane, however, required extensive repairs. *Inter alia*, the main hook had to be replaced; damaged steel cable reeving had to be replaced; sections of the crane boom had to be repaired or replaced all due to damage received when the hook broke on 10 October 1986. Another offshore deck installation required the Shearleg crane on 8 December 1986. McDermott completed its repairs by that time, but had to adapt the crane's block to use another hook, as AmClyde had not yet provided a replacement for the broken one.

On 10 October McDermott advised AmClyde and British Ropes of their products' failures, and on 13 October 1986 made its call in warranty against AmClyde. Shortly thereafter, McDermott and AmClyde agreed to send the failed hook to Packer Engineering for metallurgical and mechanical tests and analysis, in an effort to determine the cause of its failure. Packer's tests and analysis indicated that the hook did not meet required

specifications and, particularly, found substantial cast-in flaws on the fracture surface that were involved in the failure of the hook. This information, combined with eyewitness observations, corroborating evidence gleaned from analysis of the structural damage to the deck, and the position of the broken prong when it imbedded in the SNAPPER deck, all showed that the hook was defective and that its failure, more probably than not, precipitated the accident of 10 October 1986. AmClyde obtained a contrary analysis, laying blame on the cable-laid sling's failure and blaming the sling's failure on an alleged "unwinding" effect produced by linking left hand and right hand cable-laid slings together end-to-end.

AmClyde denied McDermott's warranty claim for the replacement hook and repairs, claiming that the hook did not cause the accident, although the contract warranty provision called for free replacement of "defective" parts regardless of whether they caused an accident. McDermott, acting under close schedule constraints for the Shearleg crane in its offshore construction projects, reserved its rights and issued purchase orders to obtain a new hook and AmClyde's services to repair the crane. A replacement hook was finally delivered and installed just before the Shearleg began a tow to West African offshore construction sites, 28 May 1987. AmClyde, for its part, at all times maintained charges against McDermott for the replacement hook, regardless of its defects, because it blamed the cable laid sling failure for the 10 October 1986 accident. The present action ensued.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUIT COURTS ARE IN CONFLICT ON THE EFFECT IN MARITIME LAW OF A PLAINTIFF'S SETTLEMENT WITH LESS THAN ALL DEFENDANTS UPON THE LIABILITY OF NON-SETTLING DEFENDANTS

The Fifth Circuit, in the present case, applied its recently adopted rule of granting non-settling defendants automatic contribution from a settlement through a dollar-for-dollar credit against plaintiff's judgment, despite the fact that, per precedent in force at the time of trial, the settling tort feasors' *pro rata* share of liability was determined and also deducted from the injured party's recovery. This quandary graphically demonstrates the present disharmony in federal maritime law on the issue and the injustice of the Fifth Circuit's automatic "dollar for dollar" contribution scheme.

The lack of uniformity in the maritime law with respect to a settlement's effect on non-settling defendants' rights or liabilities in judgment and/or contribution has been noted as a substantial problem in maritime litigation, ripe for Supreme Court resolution.[1]

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[1] Chairperson of the Maritime Law Association of the United States, Committee on Uniformity, Lizabeth L. Burrell, Esq. wrote, "In the wake of the Supreme Court's decision in *United States v. Reliable Transfer Co.* and *Edmonds v. Compagnie Generale Transatlantique* courts were confronted with the need to reconcile the *Reliable Transfer* notion of comparative fault with the *Edmonds* concept of joint and several liability. One of the most troublesome issues in this area concerns the rights and liabilities of settling and non-settling tort feasors in connection with contribution and indemnity. . . . The decision and

A panel of the Fifth Circuit quietly adopted its present *pro tanto* credit approach to partial settlements in a longshoreman's case, *Hernandez v. M/V RAJAAN*, 841 F.2d 582, 591 (5th Cir. 1988), relying upon *Self v. Great Lakes Dredge & Dry Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), a seaman's case. The *Hernandez* court paid lip service to its prevailing precedent, *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979), but ignored *Leger*'s denial of contribution and determination that the settlement satisfied the settling defendant's *pro rata* liability. The Fifth Circuit's adoption of the Eleventh Circuit's *Self* rule has since grown into a total rejection of *Leger* and the *Reliable Transfer*[2] rule of comparative apportionment of liability in this context.

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comparison are at this time comprehensive and it is time for a uniform choice to be made. "Uniformity in Maritime Law," 5 U.S.C. Mar.L.J. 67, 83-85 (Fall 1992).

Please also see, E. Reddick, "Supreme Court Review of Admiralty and Maritime Issues: What's on the Horizon?", 5 U.S.F.Mar.L.J. 43, 53-57 (Fall 1992); G. Schill, "Recent Developments Regarding Maritime Contribution and Indemnity," 51 La.L.R. 975 (May 1991); E. Johnson, "The Conflicting Doctrines of *Self* and *Leger*: The Unsettling Uncertainty of Settlement in Admiralty," 41 Ala.L.Rev. 471 (Winter 1990) [" . . . the conflicting authority has created much anxiety and second guessing in maritime cases over whether or not to settle. . . . Clearly, however, the situation calls for Supreme Court review to provide the uniformity expected of federal courts sitting in admiralty."]; E. Caffrey, "Holding the Bag-Proportional Fault and the Non-Settling Defendant: *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1988 A.M.C. 2278 (11th Cir. 1987), cert. denied, 108 S.Ct. 2017, 1988 A.M.C. 2402 (1988)," 14 Tul.Mar.L.J. 415 (Spring 1990).

[2] *U.S. Reliable Transfer, Co.*, 421 U.S. 397, 1975 A.M.C. 541 (1975).

The litigation history of the Eleventh Circuit *pro tanto* settlement credit rule began with *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir. 1982) which initially parted company with *Leger*, reversing and remanding the case for a new trial holding it error to present an absent settling defendant's fault to the jury for apportionment. *Id.* at 719. The case returned to the Court of Appeals in *Self v. Great Lakes Dredge & Dry Dock, supra*, which expressly disavowed *Leger*'s *pro rata* credit for settlement rule, despite Chevron's, the settling tort feasor's, presence at the post-*Ebanks* trial on allocation of liability. *Id.* at 1547. *Self* considered itself bound by *Edmonds* to ignore Chevron's comparative liability and to effect the remedial nature of the Jones Act by protecting its seaman "ward" from a poor settlement made with Chevron. Thus, the Eleventh Circuit applied *pro tanto* credit for *Self*'s settlement to *Great Lakes'* judgment liability. The case was, nonetheless, remanded again for further proceedings in regard to the plaintiff's damages.

A third appeal, *Great Lakes Dredge & Dry Dock Co. v. Tanker ROBERT WATT MILLER*, 957 F.2d 1575 (11th Cir. 1992) ensued and brought the credit for settlement and comparative liability problem full circle through *Great Lakes'* action for contribution against Chevron. Despite the Court of Appeals' reliance in *Self* upon *Luke v. Signal Oil & Gas Co.*, 523 F.2d 1190 (5th Cir. 1975)[3] which established that settlement barred contribution claims, the Eleventh Circuit rendered Chevron's settlement nugatory

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[3] Adopted as precedent of the newly formed Eleventh Circuit per *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

and again reversed and remanded the case, now for trial of the very comparative liabilities it held improperly tried in *Self*. Only the Fifth Circuit's summary application of both the settling defendants' *pro rata* liability *and* the *pro tanto* credit for settlement in the present case against McDermott's judgment could be more arbitrary and unjust.

The Eighth Circuit's position is in direct conflict with the *pro tanto* credit for settlement approach of the Fifth and Eleventh Circuits. In *Associated Electric Corp. v. Mid-American Transportation Co.*, 931 F.2d 1266 (8th Cir. 1991), the Court of Appeals gave searching consideration to the disarrayed state of the law on this issue, the recommendations of scholarly commentators[4] and the pragmatic observations of trial court decisions. It concluded that the "proportional fault" or "*pro rata*" credit for settlement and bar against contribution in *settlement* cases, as opposed to *Edmonds statutory* immunity cases, best served all legal and policy concerns. The Eighth Circuit succinctly noted what the Fifth and Eleventh have forgotten: that "settlement dollars may be worth more or less than judgment dollars, depending on which party received the more favorable settlement." *Id.* at 1271, citing *Leger*, 592 F.2d at 1250 n.10.

The Ninth Circuit, in *Miller v. Christopher*, 887 F.2d 902 (9th Cir. 1989) also traversed its options, for dealing with a partial settlement and concluded that a "good faith" settlement should bar contribution, but did not

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[4] T. Schoenbaum, *Admiralty and Maritime Law*, § 4-15, at 153-4 (1987 ed.) (endorsing proportional fault approach).

reach the question of whether the plaintiff's judgment should be reduced by *pro rata* or *pro tanto* application of her settlement. The Court's discussion of the Uniform Contribution Among Tort Feasors Act's evolution from the unbridled contribution rule of the 1939 draft,[5] through the "good faith" settlement bar in 1955[6], to the present rule of *pro rata* satisfaction of the settling tort feasor's liability, adopted in 1977,[7] may indicate a preference for the *pro rata* approach. This inference is bolstered by the Court's approval of methodology to ascertain "good faith" by comparing the settlement to the settling defendant's proportionate, potential liability and by its proper limitation of *Edmonds*, to its statutory context.

Other Circuit Courts of Appeals have addressed ostensibly similar issues with disparate results.[8] In short,

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[5] 12 U.L.A. 99 (1975).

[6] 12 U.L.A. 99-100 (1975).

[7] 12 U.L.A. Supp. 40, 52-53 (1989).

[8] First Circuit: *Joia v. Jo-Ja Service Corp.*, 817 F.2d 908 (1st Cir. 1987) (addressed the statutorily created imbalance in liability imposed by a shipowner's right to limit liability under 46 U.S.C. § 183, *et seq.*, not a private settlement of litigation between parties);

Second Circuit: *Stanley v. Bertram-Trojan, Inc.*, 781 F.Supp. 218 (S.D.N.Y. 1991) (scholarly analysis of the problem; adopted the "proportional fault" or "*pro rata*" approach to non-settling tort feasors' liability);

Third Circuit: *Dobbins v. Crain Bros., Inc.*, 567 F.2d 559 (3rd Cir. 1977) (a longshoreman's case governed by the pre-1972 law which permitted unseaworthiness recovery against a shipowner and *Ryan* indemnity. The Court set off, *pro tanto*, the employer's settlement of "non-compensation" claims with the plaintiff against the shipowner's liability, anticipating that the shipowner would recoup indemnity from the employer);

Fourth Circuit: *Burden v. U.S.*, 1993 AMC 40 (S.D.W.Va. 1992) (imposed a settlement bar to contribution, but indicated

the maritime law, in which uniformity is of grave importance, is in such disarray with regard to the effect of settlement with less than all defendants in a multi-party case, that neither courts nor parties can effectively order their affairs except by unrelenting litigation to judgment. McDermott seeks the guidance of this Honorable Court to correct the Fifth Circuit's unjust reduction of its damages by *both pro rata* and *pro tanto* credits for settlement and to provide a considered, fair and uniform rule for all inferior courts.

II. THE FIFTH CIRCUIT HAS OVERSTEPPED THIS COURT'S RULING IN *EAST RIVER* BY DENYING *ALL* RECOVERY OF ANY DAMAGES AGAINST AMCLYDE AND BY DENYING ALL RECOVERY OF DAMAGE TO THE "PRODUCT ITSELF," AGAINST RIVER DON EVEN THOUGH McDERMOTT SUFFERED PHYSICAL DAMAGE TO "OTHER PROPERTY" IN THE SAME CATASTROPHIC INCIDENT

This Honorable Court's landmark decision, *East River SS. Corp. v. Transamerica Delaval, Inc.*[9], expressly incorporated products liability into the law of admiralty. *East River* did not, however, address the situation presented here – violent, catastrophic physical damage to the product itself *and* other property. Nor did *East River* reach

availability of a *pro tanto* "set off" of the settlement against judgment; *Doyle v. U.S.*, 441 F.Supp. 701 (D.S.C. 1977) adopted an equitable or *pro rata* reduction of non-settling tort feasors' liability.

[9] 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed. 865 (1986).

issues of comity or uniformity in the international maritime community with regard to the products liability and economic loss issues now before the Court.[10] Such issues, not raised by the facts of *East River*, were left open and are implicated by the present action.

East River's jurisprudential and public policy underpinnings provide some guidelines to aid inferior courts in doing justice by forwarding tort law concerns for physical safety and contract/warranty concerns for product value through a coherent law of maritime products liability. The Fifth Circuit has stripped *East River* of these underpinnings, using it as a "bright line" scythe to clear injured plaintiffs, like McDermott, from its docket. Manufacturers need show little concern for the safety of their products, if they are destined for the Gulf of Mexico. That is contrary to the policy *East River* announced for maritime products liability.[11]

This Honorable Court said:

> "The paradigmatic products-liability action is one where a product reasonably certain to place

[10] R. Force, "Maritime Products Liability in the United States," 11 Mar.L. 1, 3 (1986).

[11] Nonetheless, at least one commentator noted that *East River* might be used by manufacturers in litigation, as in the present case, to wholly avoid responsibility for truly dangerous products: "In reality, the decision provides comfort to manufacturers seeking to minimize their responsibility for losses caused by their dangerous products. . . . Of course, litigation will be simplified because the manufacturer will always win these cases . . . ". S. Swanson, "The Citadel Survives . . . ," 12 Tul.Mar.L.J. 135, 139 (1987).

life and limb in peril, distributed without reinspection, causes bodily injury. See, e.g. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389, 111 N.E. 1050, 1051, 1053 (1916). The manufacturer is liable whether or not it is negligent because public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal.2d, at 462, 150 P.2d, at 441 (opinion concurring in judgment).

For similar reasons of safety, the manufacturer's duty of care was broadened to include protection against property damage. See *Marsh Wood Products Co. v. Babcock & Wilcox Co.*, 207 Wis. 209. 226. 240 N.W. 392, 399 (1932); *Genesee County Patrons Fire Relief Assn. v. L. Sonneborn Sons, Inc.*, 263 N.Y. 463, 469-473, 189 N.E. 551, 553-555 (1934). Such damage is considered so akin to personal injury that the two are treated alike. See *Seely v. White Motor Co.*, 63 Cal.2d, at 19, 45 Cal.Rptr., at 24, 403 P.2d, at 152.

> In the traditional property damage cases, the defective product damages other property. In this case, there was no damage to other property.

East River, 476, U.S. at 866-867, 106 S.Ct. at 2300.

The Court's references *inter alia* to *MacPherson*, *Seely*, *Robins Dry Dock*,[12] *TESTBANK*,[13] and the Restatement

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[12] *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134 (1927).

[13] *Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985) (en banc), *cert denied*, 477 U.S. 903, 106 S.Ct. 327 (1986).

(second) of Torts §§ 395 and 402A suggest that while *East River* fashioned a new rule for United States maritime law, it did not break entirely with established principles regarding recovery of economic losses in tort. Thus, *East River*, and even Fifth Circuit jurisprudence, until the present case, stood for the proposition that pure economic losses, *without* physical injury to a "proprietary interest" were not compensable in tort and for its corollary, that where, as in this case, there *is* physical damage to a plaintiff's proprietary interest, recovery of all damages occasioned by the tortious incident is available in tort/products liability. There is no indication in *East River* or its supporting materials that economic losses, occurring in a tortious incident with physical damage to "other property" or personal injury must be carved out and separately presented in an independent warranty action, though inextricably intertwined with a tort/products liability action for all other damages.

State courts have experienced and repudiated such "gerrymandering" in products liability cases. The Texas Supreme Court, for instance, nearly a decade before *East River*, presaged its holding in *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977). The *Nobility* Court also looked to *Seely v. White Motor Co.*, 63 Cal.2d 9, 45 Cal.Rptr. 17, 403 P.2d 145 (1965), for expression of the proposition:

> The distinction that the law was drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical

> injury. The distinction rest, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. *He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm.* He cannot be held for the level of performance of his products in the consumer's business *unless he agrees that the product was designed to meet the consumer's demands.* [emphasis added].

Seely, 403 P.2d at 151.

Justice Pope of the Texas Supreme Court, in his learned dissent from the majority in *Mid Continent Aircraft v. Curry Cty. Spraying Svc.*, 572 S.W.2d 308, 313 *et seq.* (Tex. 1978) detailed the underpinnings that supported *Seely, Nobility* and ultimately *East River*. "The reason that *Nobility, Melody Home*, and *Seely* held there was no strict liability case for the product itself was the absence of proof and findings that there was a defect that was unreasonably dangerous that produced the accident." *East River* also lacked any such finding. Justice Pope went on to note:

> " . . . '[E]conomic loss' is not the same thing as 'physical harm' that is required by [Restatement 2d Torts] Section 402A. A defect that is not unreasonably dangerous, does not result in an accident, or one that must only be repaired or replaced, is not a tort action. [citation omitted] . . . "
>
> A similar result has been suggested under New York law: '[a] truck's defective brakes may give rise to either economic loss or property damage, depending upon the facts. If the defect

> is discovered and the truck is thereby rendered temporarily unusable, its owner may suffer economic damage, consisting of the costs of repairing the brakes, as well as consequential 'economic loss' of profits resulting from his inability to use the truck in his business. On the other hand, if the defect is not discovered and an accident with another vehicle occurs, *the damage to both the truck and the other vehicle resulting from the impact constitutes property damage.* It may be noted that damage to the defective product itself may only amount to property damage and not economic loss. It is only when damage results from non-accidental causes, such as deterioration or breakdown, that economic loss in the pure sense, rather than property damage, has occurred. Zammit, 'Manufacturers' Responsibility for Economic Loss Damages in Products Liability Cases: What Result in New York?' 20 N.Y.L.F. 81, 82 (1974). [emphasis added]

Mid Continent, supra at 317-318. Justice Pope's position prevailed in the Texas High Court's next opinion on this matter, *Signal Oil & Gas Universal Oil Products*, 572 S.W.2d 320, 325 (Tex. 1978), and remains the law. As Dean Page Keeton said, "A hazardous product that has harmed something or someone can be labeled as part of the accident problem; tort law seeks to protect against this type of harm . . . " Keeton, "Annual Survey of Texas Law, Torts", 32 S.W.L.J. 1, 5 (1978).

The AmClyde-supplied Shearleg Crane and its hook were defective and unreasonably dangerous. They dropped a 4100 ton steel deck, operating in 850 feet of water, with numerous persons in harm's way. The line separating "injury only to the product itself/economic

loss" and "unreasonably dangerous/physical damage" was crossed. The Shearleg Crane was not just a disappointment, it became "part [and parcel] of the accident problem". McDermott's entire loss, including its crane damage, should be cognizable in tort, particularly in strict products liability. Please see R. Force, "Maritime Products Liability in the United States," 11 Mar.L. 1, 33 n. 135, 37 (1986); S. Swanson, "The Citadel Survives. . . . ," *supra*, at 138 and n. 10.

A non-partisan reading of *East River's* disallowance of products liability recovery for "pure economic loss" or injury "solely to the product itself" ". . . raises the inference that, had the defective turbines caused physical injury or damage to other property, a products liability action would lie. . . . " Hon. J. Wisdom, "Admiralty Jurisdiction and Products Liability: Economic Law," 62 Tul.Mar.L.J. 325, 333 (1988). It appears clear that, at least under facts comparable to those presented in *East River*, this Honorable Court diverged from *Seely*, Restatement § 402A, and the majority rule of products liability which allowed recovery for physical damage to the product itself arising from an unreasonably dangerous defect. R. Force, "Maritime Products Liability," *supra*, at 33 and discussion in n.135-136; Note: *"East River Steamship Corp. v. Transamerica Delaval, Inc.*: Admiralty Law – Recovery for Losses Caused by Product Self-Injury," 61 Tul.L.R. 1229, 1234-1235 (1987); S. Swanson, "The Citadel Survives," *supra*, at 147, 155, 156, 169-171. Therefore, if the avowed legal policy bases of *East River* are not to be completely ignored and if products liability's safety concerns are not to drown in a sea of irresponsible free market theory, parties, like McDermott here, who have

suffered physical injuries to "other property" due to catastrophic failure of a product, must be permitted to recover all their provable damages from the parties responsible for the accident.

East River's total exculpation of product suppliers from liability for losses to dangerously defective products alone was not required by the facts of the case. There was no competent evidence that the turbine failures considered in *East River* endangered persons or other property. As such, the safety concerns of tort law and products liability, as stated in Restatement (second) of Torts § 402A were clearly not implicated. With very different facts now before the Court, this "rule" should be reexamined in light of safety policy and judicial administration experience provided by the products liability law of our states, lower federal courts and neighbors in international maritime commerce, as well as the light provided by consideration of the relative scopes of the Uniform Commercial Code and the Restatement's products liability provisions. Such a review would reveal, in sum, that recovery for damages arising from a defective, unreasonably dangerous product itself should lie in products liability rather than the ill-suited confines of warranty. The Uniform Commercial Code was intentionally limited to transactions, not injuries. Karl Llewelyn's attempts to add a 402A-like provision to the Code were rejected as inappropriate. On the other hand, section 402A was clearly intended, by its focus upon defendants ". . . in the business of selling such a product . . . ," to intervene in the market when mere disappointment turns to unreasonable danger. Please see discussion in Rafferty, "Recovery in Tort for Purely Economic Loss: Contract Law on the

Retreat," 35 U.N.B.L.J. 111 (1986); S. Swanson, "The Citadel Survives . . . ," *supra*, at 158-164. Fears that tort law will "drown" warranty or contract law, if tort recovery is allowed for damage to the unreasonably dangerous product itself, have not been realized in the long experience of our international maritime neighbors or in the lower federal courts. Please see the exhaustive discussion of the Canadian and European experiences in *Norsk Pacific Steamship Co., Ltd. v. Canadian Nat'l R. Co.*, 1992 A.M.C. 1910 (S.Ct. Canada 1992) and J. Shepard, "The Murkey Waters of *Robins Dry Dock*," 60 Tul.L.R. 995 (1986).

In essence, where the issue is one of damage caused by an unreasonably dangerous, defective product, ". . . a buyer, commercial or otherwise, should not be forced to bargain for reasonable product safety." Note: *"East River Steamship Corp. . . . ,"* 61 Tul.L.R. at 1235. It is plainly absurd to assume that any party, commercial or consumer, when bargaining for a product would even consider accepting the risk that the product for which he will put down good money is not merely less valuable than expected, but actually unreasonably dangerous to persons and property. Thus, absent most unusual circumstances, a buyer could not have knowingly waived such liability in a contract of sale. A taxi cab driver may fairly be thought to contemplate differences in quality and price between a Hyundai and a Mercedes, but no one could be rationally presumed to bargain for a Mercedes that will spontaneously explode, even at a Hyundai price. Yet that is what the Fifth Circuit opinion submitted for review posits as federal maritime law.

III. THIS HONORABLE COURT'S SUPERVISORY POWERS OVER THE CIRCUIT COURTS OF APPEALS ARE INVOKED TO REMEDY THE FIFTH CIRCUIT'S ERRONEOUS DENIAL OF MCDERMOTT'S DUE PROCESS RIGHT TO TRY ITS DAMAGES TO THE PRODUCT ITSELF, THE SHEARLEG CRANE, TO A JURY

The panel opinion, in section V (Appendix pp. A-18-19), seriously erred in holding that McDermott did not preserve its claim to warranty recovery from River Don for damage to the Shearleg Crane. In fact, the Magistrate Judge ruled at the outset of trial that McDermott could not present its warranty-based claim against River Don for Crane damages. At page 59 (Appendix p. A-40), the Court ruled broadly, "It would be on the crane. I don't know that you would have anything on River Don. Mr. Lea: And so I can't mention that? The Court: No."

Further, at page 976 (Appendix p. A-41) (Mr. Moseley asked the Court,

> ". . . I understand the ruling of the Court was that with regards to the object itself, the crane, that we were prevented from putting on any issue of damages with regards to that because our only remedy was - was replacement of the hook? The Court: Damages; yes. . . . Mr. Moseley: I've only prepared damages with regards to the deck, and that's what I've got my witness here for, so any - any documents regarding the - crane itself, I have excluded from - from those - the documents which I had in a - a package and, in effect, those are reserved for whatever issues on appeal. . . ."

Review of plaintiff's pleadings, discussed at pages 976-983 (Appendix pp. A-41-48), shows that while the colloquy with the Court is difficult to decipher *in vacuo*, it certainly addressed the Court's rulings on *East River*'s limitation of tort recovery *and* his ruling precluding presentation of McDermott's case in warranty against River Don for Crane damages.

McDermott went on to ensure preservation of its claims for crane damages by proffering the evidence supporting said damages as Exhibit "P-351" (Appendix pp. A-43, 49-50). McDermott, having been precluded at the outset from presenting any evidence of its crane damages, could not, at the close of trial, ask the court to submit the issue to the jury.

Plaintiff submits that opposing counsel and the Magistrate Judge, through a per curiam can confirm what all understood at trial – that McDermott was wholly precluded from presenting any evidence of crane damages against River Don. Defendants' counsel certainly understood that he had won his battle to keep out all claims for crane damages as to both his clients, whether under tort or contract theories and defendants' counsel could hardly represent otherwise to the trial court or this Honorable Court, if asked today.

In short, the panel decision that McDermott did not preserve its claims for crane damages against River Don is based upon a misapprehension of the trial court's broad ruling precluding all presentation of crane damages, whether in tort or contract and the Court of Appeals' failure to note McDermott's proffer of evidence. Due process and the Seventh Amendment require remand

of this matter for presentation of the proffered crane damages, at least *per* River Don's affirmed liability.

CONCLUSION

This Honorable Court should grant this application for writ of certiorari to resolve the conflict among the federal Circuit Courts of Appeals, the disharmony in federal maritime law, and the injustice of the Fifth Circuit's credit to trial defendants of both settling defendants' *pro rata* share of liability and *pro tanto* credit for the settlement amount. A writ of certiorari should also issue to review the Fifth Circuit's denial of all recovery against AmClyde and recovery against River Don for damage to the Shearleg Crane, the product itself, when both defendants were found liable for physical damage to other property and catastrophic physical damage to the product itself, demonstrating an unreasonably dangerous defect, occurred and evidence thereof was admitted and/or proffered at trial. The Fifth Circuit Court of Appeals seriously erred in respect to the foregoing issues; therefore, McDermott, Inc. prays that this Honorable Court issue the writ of certiorari and after due proceedings had, reverse the rulings complained of and remand this matter to the trial court for reinstatement of its judgment against AmClyde and River Don in respect of damages to the SNAPPER deck and denial of a *pro tanto* credit for the

sling defendants' settlement, and for trial of McDermott's damages to the Shearleg crane.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2246

MCDERMOTT, INC.,

Plaintiff-Appellee,
Cross-Appellant,

versus

CLYDE IRON, ET AL.,

Defendants,

AmCLYDE, A Division of AMCA International, Inc., and RIVER DON CASTING LTD.,

Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Dec. 11, 1992)

Before HIGGINBOTHAM and DUHÉ, Circuit Judges, and HARMON,* District Judge.

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* District Judge of the Southern District of Texas, sitting by designation.

HIGGINBOTHAM, Circuit Judge:

This is a suit for damage to property resulting from a failure of a large crane on an offshore platform. AmClyde and River Don appeal from a judgment on the jury's verdict urging that AmClyde's contract with McDermott, and general maritime law, protect them from liability in warranty and tort in addition to the limits on tort liability under the *East River* doctrine and that, in any event, they are entitled to the credit of McDermott's settlement with others. McDermott cross-appeals attacking the application of *East River* and the denial of recovery for damage to the crane itself. We reverse the judgment against AmClyde. We conclude that River Don is liable to McDermott, but hold that River Don is entitled to full credit for McDermott's settlement.

I.

On January 10, 1986, McDermott contracted to purchase a 5,000 ton Shearleg crane designed and manufactured by AmClyde. The contract covered twenty-five pages and included several provisions purporting to limit potential liability. McDermott intended to use the crane to move the deck portion, the Snapper deck, of an offshore platform used in drilling for oil and natural gas. AmClyde designed the crane's hook. River Don was not a party to the McDermott-AmClyde contract but manufactured the hook under a subcontract with AmClyde.

On October 10, 1986, McDermott was using the crane to lift the approximately 3,950 ton Snapper deck. The crane was mounted aboard the vessel Intermac 600 in the Gulf of Mexico off the coast of Texas. As the crane lifted

the deck, one of the prongs on the hook and one of the slings holding the deck broke, and the deck fell onto the barge with serious damage to the crane and deck. This suit followed.

McDermott sued AmClyde, River Don, two manufacturers of the slings, and another sling supplier asserting tort and contract claims. AmClyde filed a third-party claim against Hudson Engineering, the McDermott subsidiary that designed the sling rigging arrangement used for the lift. AmClyde also counterclaimed for the cost of replacing the allegedly defective hook.

AmClyde and River Don moved for partial summary judgment arguing that AmClyde and McDermott agreed in the contract to restrict any tort and contract liability to repair or replacement and that under general maritime law there is no recovery for product damage and resulting economic loss under *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986). The magistrate judge denied the motion.

On the eve of trial, McDermott settled with the three sling-related defendants for $1 million. AmClyde and River Don claimed a dollar-for-dollar credit for the $1 million settlement against any judgment against them, citing *Hernandez v. M/V RAJAAN*, 841 F.2d 582 (5th Cir. 1988). In his opening statement, counsel for McDermott told the jury that McDermott accepted responsibility for any part the slings played in causing the damage. The settlement documents were not formally executed until after the jury returned its verdict. That detail disclosed that the settlement agreement attributed one half of the

total settlement to crane damages and one half to deck damages.

Shortly after trial began, the magistrate judge, relying on *East River*, ruled that McDermott could not recover in tort for damage to the product itself, the crane and the hook, but that it could recover in tort for damage to the deck as "other property." At trial then, McDermott's claim for damages to the crane was limited to the remedies provided for in its contract with AmClyde.

The jury found the crane's hook to be defective, that the defect was one of materials or workmanship and misrepresentation, and that this defect was a producing cause of injury. The jury also found that AmClyde breached express and implied warranties that were a producing cause of injury. The jury awarded compensatory damages of $2.1 million for damage to the deck, attributing the cause of the accident 32% to AmClyde, 38% to River Don, 0% to Hudson Engineering and 30% to "McDermott/sling defendants." The jury was not asked to determine separately McDermott's contribution to the accident despite its assumption of any damage caused by the sling defendants. The court later denied AmClyde and River Don's request for a $1 million credit against the verdict and rendered judgment on the jury's verdict against AmClyde in the amount of $672,000.00 and against River Don in the amount of $798,000.00.[2]

AmClyde and River Don appeal, and McDermott cross-appeals. AmClyde and River Don first argue that

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[2] The jury also found in favor of McDermott on AmClyde's counterclaim. AmClyde does not appeal this determination.

recovery for damages to the deck cannot be supported by a breach of contract, because the parties disclaimed all warranties, except a limited replacement and repair warranty for materials and workmanship. Second, they contend that McDermott was not entitled to any recovery in tort for damage to the deck, because (1) the McDermott-AmClyde contract waived all tort liability as to AmClyde and River Don, and (2) *East River* precludes any tort claims for damage to *both* the crane and the deck. Third, AmClyde and River Don assert that the trial court should have granted their motions for directed verdict and judgment notwithstanding the verdict, because McDermott failed to prove causation. Finally, AmClyde and River Don claim an offset of the $1 million settlement under *Hernandez*, alternatively, that they are entitled to a new trial because of various erroneous rulings on questions of evidence.

McDermott contends that it is entitled to recover for damage to the crane as well as the deck. McDermott requests a remand for trial on the amount of damages to the crane only, contending that the jury has already determined the liability of AmClyde and River Don. McDermott argues that it should not be limited to the replacement of defective parts under the contract, because (1) AmClyde's refusal to replace the hook free of charge caused the limited warranty to fail of its essential purpose; (2) AmClyde made broad and undisclaimed warranties by incorporating technical specifications into the document; (3) the warranty was modified by later dealings between the parties and assurances from AmClyde that it would "stand behind its product"; (4) the replacement warranty applies only to AmClyde's

manufacture of the crane, not to its design and sale. Second, McDermott contends that *East River* does not bar recovery for damage to the crane, because other property, the deck, along with the crane was damaged. Third, McDermott argues that its claims against River Don should not be governed by the rule of *East River* because there was no contractual relationship directly between them. Finally, McDermott claims prejudgment interest and urges that the jury's verdict should be corrected to show that the jury allocated causation and not fault.

II.

We are convinced that the contract between McDermott and AmClyde controls AmClyde's liability to McDermott. It is urged that McDermott's recovery in warranty is limited to the replacement/repair warranty in the McDermott-AmClyde contract, and the contract precludes McDermott from recovering in tort. We agree and reverse the judgment against AmClyde. Although we conclude that River Don is not protected by the limited liability provisions in the contract between McDermott and AmClyde, and River Don is liable to McDermott, we find that River Don is entitled to a credit of McDermott's settlement with the sling defendants. We address AmClyde first, then River Don.

III.

The language of the contract is critical to McDermott's recovery against AmClyde in warranty, and we focus on Article XV[3]. The parties agree that we must look

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[3] ARTICLE XV - WARRANTY

A. The Seller warrants equipment of its own manufacture to be free from defects in materials and workmanship under normal use and service for a period of six (6) months after first use and not to exceed twelve (12) months after shipment or notification of readiness for shipment. This warranty extends only to the Buyer, and in no event shall the Seller be liable for property damage sustained by a person designated by the law of any jurisdiction as a third party beneficiary of this warranty or any other warranty held to survive the Seller's disclaimer. This warranty does not extend to normal wear and tear or to the equipment, materials, parts and accessories manufactured by others, and THE BUYER AGREES THAT IT MUST RELY SOLELY ON THE MANUFACTURER'S WARRANTIES APPLICABLE, AND THAT IT SHALL HAVE NO REMEDY AGAINST THE SELLER FOR BREACH OF A MANUFACTURER'S WARRANTY. This warranty shall be NULL AND VOID if any repairs, modifications or alterations are made to the equipment supplied hereunder during the warranty period by the Buyer or by others on his behalf without the prior written consent of the SELLER. THE WARRANTY DESCRIBED IN THIS PARAGRAPH SHALL BE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

B. Upon written notification received by the Seller within the above stated warranty period of any failure to conform to the above warranty, upon return

to the law of New York in interpreting this contract. Under New York law, these issues of contract interpretation are considered questions of law. *Maio v. Gardino*, 585 N.Y.S.2d 529, 530 (N.Y. App. Div. 1992); *Trustco Bank v. 11 North Pearl Assoc.*, 580 N.Y.S.2d 847, 848 (N.Y. Sup. Ct. 1992). Thus, our review is *de novo*.

A.

In Article XV, AmClyde warrants that equipment of its own manufacture will be free from defects in materials

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prepaid to the Seller of any nonconforming original part of component and upon inspection by the Seller to verify said nonconformity, the Seller shall repair or replace said original part or component without charge to the Buyer. The Seller shall ship the repaired or replaced part or component to the Buyer at the Buyer's expense. Correction of nonconformities, in the manner provided above, shall constitute fulfillment of all liabilities of the Seller to the Buyer or any other person whether based upon Contract, tort, strict liability or otherwise.

C. The remedies set forth herein are exclusive, without regard to whether any defect was discoverable or latent at the time of delivery of the apparatus to the Buyer. The essential purpose of this exclusive remedy shall be to provide the buyer with repair or replacement of parts or components that prove to be defective within the period and under the conditions previously set forth. This exclusive remedy shall not have failed of its essential purpose (as that term is used in the Uniform Commercial Code) provided the Seller remains willing to repair or replace defective part to components within a commercially reasonable time after it obtains actual knowledge of the existence of a particular defect.

and workmanship and that the exclusive remedy for the breach of this limited warranty will be repair or replacement of defective parts. Such agreed upon limits on remedy are generally valid. N.Y. U.C.C. Law § 2-719 (McKinney 1991)[4]; *Employers Ins. of Wausau v Suwannee River Spa Lines, Inc.*, 866 F.2d 752, 776 (5th Cir. 1989); *American Elec. Power Co. v. Westinghouse Elec.*, 418 F. Supp. 435, 452-53 (S.D.N.Y. 1976).

The jury found a defect in materials or workmanship, and therefore, a breach of this limited warranty. McDermott attempts to escape the restriction on remedy that it agreed to urging that this remedy "failed of its essential purpose."[5]

The policy behind the failure of essential purpose rule is to insure that the buyer has "at least minimum

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[4] N.Y. U.C.C. § 2-719(1) provides:

Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

[5] N.Y. U.C.C. § 2-719(2) provides:

Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

adequate remedies." U.C.C. § 2-719 Comment 1. Typically, a limited repair/replacement remedy fails of its essential purpose where (1) the "[s]eller is unsuccessful in repairing or replacing the defective part, regardless of good or bad faith; or (2) [t]here is unreasonable delay in repairing or replacing defective components." *Cayuga Harvester, Inc. v. Allis-Chalmers, Corp.*, 465 N.Y.S.2d 606, 613 (N.Y. App. Div. 1983). McDermott and AmClyde were aware of this rule, expressly addressing the doctrine in their contract. Article XV.C, provides: "[t]his exclusive remedy shall not have failed of its essential purpose . . . provided the Seller remains willing to repair or replace defective part to components within a commercially reasonable time after it obtains actual knowledge of the existence of a particular defect." *See* James J. White & Robert S. Summers, *Uniform Commercial Code* § 12-10 (3d ed. 1988) (stating that such a clause may give the seller greater protection).

McDermott argues that the limited remedy failed of its essential purpose, because AmClyde did not replace the crane hook free of charge. McDermott, with agreement of AmClyde and River Don, sent the hook to Packer Engineering for testing. Packer determined that the hook was defective, and McDermott demanded a replacement from AmClyde under the limited warranty. AmClyde responded that McDermott must first send them a purchase order. McDermott sent the purchase order, and AmClyde later sent a new hook, both parties expressly reserving their rights. AmClyde, as we noted, counterclaimed for the cost of the replacement hook, arguing that the hook was not defective, but failed at McDermott's

negligent hand. Based on the jury's verdict, the magistrate judge refused to order payment for the replacement hook.

McDermott's assertion that AmClyde did not replace the hook free of charge is apparently based on AmClyde's requirement of a purchase order and the contest of its obligation to provide a free replacement. McDermott received a new hook and at no cost. AmClyde never denied its obligation to replace a defective hook. It only denied that the hook was defective. It lost that argument and honored its obligation. We find no failure of purpose.[6]

B.

McDermott argues that in addition to the limited warranty in Article XV, the contract gained another express warranty by incorporating design specifications.[7]

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[6] McDermott further argues that the replacement warranty applies only to AmClyde's manufacturing of the crane, not to its design and sale. We find no merit to this contention. *See e.g., American Elec. Power Co. v. Westinghouse Corp.*, 418 F. Supp. 435 (S.D.N.Y. 1976) (court recognized the validity of a similar limitation of warranty/exclusive remedy provision where defendant's responsibility encompassed manufacturing, construction, and design); *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 631 F. Supp. 1123 (E.D. La. 1986), *aff'd*, 825 F.2d 925 (5th Cir. 1987), *cert. denied*, 485 U.S. 1007 (1988) (Avondale's limited warranty/exclusive remedy provision was enforced notwithstanding Avondale's involvement in manufacturing, construction, and design).

[7] ARTICLE I – SCOPE OF WORK

A. Provide one 5000 short ton shearleg derrick package for barge mounting in accordance with specification no.

The *Specifications* state that "[t]he crane when erected will be capable of lifting 5000 ST to a reach of 100 feet measured from the boom heel pin." McDermott argues that this language created an express warranty of the crane's lifting capacity or a "design warranty."

We decline this journey, however, because assuming there was a "design warranty," it was not breached. The jury found that the defect in the crane was one of materials or workmanship and misrepresentation and specifically *not* a defect in design.

McDermott also argues that AmClyde gave other express warranties after the parties executed the contract. McDermott relies on an exchange of letters between AmClyde vice president Michael J. Ucci and McDermott vice president W.L. Higgins. Mr. Ucci wrote in part:

> In the unlikely event the 5000 ST Shearleg Derrick being designed by Clyde does not perform according to the specification, Clyde would ensure that any deficiencies are corrected. Our track record in this area should speak for itself, but in addition I am giving you my personal assurance that we will stand behind our product.

Mr. Higgins responded:

> To the extent that you have expanded on the intent of the warranty of the 5000 ST Shearleg

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8506-12D/B REV 2 entitled "*Specifications for 5000 short ton shearleg derrick*" dated December 12, 1985 (EXHIBIT A) and as described in your Proposal dated December 9, 1985, *all of which are incorporated by this reference.*
(emphasis added).

> Derrick, we understand you to say that Clyde will correct any such deficiencies and will cooperate with McDermott to do so expeditiously and with a minimum of inconvenience and expense. This of course would conceptually include having the work done locally to avoid the time and expense of taking the equipment out of service and sending it to Duluth, Minnesota to correct deficiencies.
>
> We accept your personal assurance that Clyde will accept the additional warranty responsibility. McDermott trusts that the entire Clyde organization endorses the intent of your Comfort Letter and in particular, the notion that Clyde will stand behind its product.

McDermott argues that these letters created a new warranty.

An express warranty arises through "[a]ny affirmation of fact or promise by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain." N.Y. U.C.C. § 2-313(1)(a) (McKinney 1991). We do not read these two letters to create a new or different warranty. Instead, Mr. Ucci only reaffirmed AmClyde's obligation to repair or replace any defective parts. Regardless, McDermott cannot overcome the contract's integration clause requiring a signed writing for its modification.[8] These provisions are specifically validated by

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[8] ARTICLE XXI – INTEGRATION

This document constitutes the entire Agreement between the parties. There are no understandings as to the subject matter of this Agreement other than as herein set forth. All previous communications

U.C.C. § 2-209(2), and a signed writing is required to modify or rescind them.[9] McDermott counters with a waiver argument. As circular as the notion may be, it is true that an integration clause can be waived, *see* U.C.C. § 2-209(4),[10] but we conclude that no waiver occurred.

McDermott states that both parties "as a normal course of conduct . . . regularly accommodated, modified, supplemented, and finalized important aspects of the Shearleg Crane and its warranted qualities after signing an initial contract document," and contends that this course of dealing constituted a waiver of the contract's modification requirement. The only case McDermott cites on this point is *Linear Corp. v. Standard Hardware Co.*, 423 So. 2d 966 (Fla. Dist. Ct. App. 1982). That case involved a contract for the sale of electronic security devices

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concerning the subject matter of this Agreement are hereby abrogated and withdrawn. This Agreement may not be modified except by a writing signed by both parties, and any printed terms and conditions submitted by either party during the course of this Agreement shall be of no force or effect, unless expressly agreed to the contrary in writing by both parties.

[9] N.Y. U.C.C. § 2-209(2) provides:
A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

[10] N.Y. U.C.C. § 2-209(4) provides:
Although an attempt at modification or recision does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

between a manufacturer and a wholesaler. The contract expressly stated that the goods were not purchased on consignment and could not be returned. The contract further required a signed writing to modify. The court found a waiver of this writing requirement and a new agreement to repurchase, concluding from a number of letters and telephone conversations that the seller had agreed to a return of unsold equipment.

In *Linear*, the new agreement involved a major change to the contract, the right to return the goods. The changes referred to by McDermott involved technical details that would have been difficult to spell out in the contract. More important, the McDermott-AmClyde contract authorized changes to "plans, designs, or specifications."[11] These changes did not modify the contract; they were contemplated by the parties, and the parties specifically provided for them in the contract. Relatedly and significantly, AmClyde and McDermott abided by the integration clause in performing the contract, executing a modification by a signed writing on one occasion. Representatives of McDermott and AmClyde executed a formal contract Addendum changing the indemnity/Hold

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[11] ARTICLE V – CHANGES

A. Buyer may, at any time by a written order, make changes within the general scope of this Contract in any one or more of the plans, designs, or specifications. If any such change causes an increase or decrease in the cost of or the time required for the performance of any part of this Contract, the Seller must advise Buyer Representative immediately and confirm to Buyer in writing within 5 working days. Nothing in this section shall excuse Seller from proceeding with the Contract as changed.

Harmless provisions. At the same time, the parties left the WARRANTY and INTEGRATION clauses untouched. If Mr. Ucci and Mr. Higgins intended to create a new warranty, they could have done so by complying with the contract's integration clause.

C.

The jury found that AmClyde breached an implied warranty of the hook. AmClyde argues, however, and we agree that this finding has no legal consequence. The McDermott-AmClyde contract waived all implied warranties. N.Y. U.C.C. Law § 2-316(2) (McKinney 1991).[12] Moreover, McDermott admitted that the contract waived all implied warranties under Fed. R. Civ. P. 36(b). AmClyde asked McDermott to admit or deny "[t]hat the Contract for Supply of 5,000 Short Ton Shearleg Derrick between McDermott and Clyde Iron dated January 10, 1986, in Article XV(A), waived any implied warranty." McDermott replied "Admitted." The magistrate should have ignored the jury's answer to this question. *American*

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[12] N.Y. U.C.C. § 2-316(2) provides:
Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

Automobile Ass'n. v. AAA Legal Clinic, 930 F.2d 1117, 1120 (5th Cir. 1991).

IV.

This brings us to McDermott's tort claims against AmClyde. Article XV of the McDermott-AmClyde contract provides that: "Correction of nonconformities, in the manner provided above, shall constitute fulfillment of all liabilities of the Seller to the Buyer or any other person *whether based upon Contract, tort, strict liability or otherwise.*" (emphasis added). AmClyde argues that this provision protects it from liability to McDermott in tort. We agree.

Contractual provisions waiving negligence and strict liability claims are enforceable under New York law. *See Laudisio v. Amoco Oil Co.*, 437 N.Y.S.2d 502, 504 (N.Y. Sup. Ct. 1981) (negligence); *Velez v. Craine & Clark Lumber Corp.* 350 N.Y.S.2d 617, 623 (N.Y. 1973) (strict liability). Contractual waivers of liability are subject to close judicial scrutiny and "it must appear plainly and precisely that the limitation extends to negligence or other fault of the party attempting to shed his ordinary responsibility." *Howard v. Handler Bros. & Winell*, 107 N.Y.S.2d 749, 752 (N.Y. App. Div. 1951), *aff'd*, 106 N.E.2d 67 (N.Y. 1952); *Gross v. Sweet*, 424 N.Y.S.2d 365, 368 (N.Y. 1979). McDermott does not attack the exculpatory provision in the McDermott-AmClyde contract as being vague or ambiguous. The provision is precise. It specifically mentions "tort" and "strict liability," terms familiar to sophisticated business entities such as these. *See Gross*, 424 N.Y.S.2d at 368 (noting that broadly worded clauses may be sufficient

where sophisticated business entities are involved). Moreover, similar clauses are common in commercial markets. *See e.g. Nicor Supply Ships Assocs. v. General Motors*, 876 F.2d 501, 504 (5th Cir. 1989); *Arkwright-Boston Mfrs. Mutual Ins. Co. v. Westinghouse Elec. Corp.*, 844 F.2d 1174, 1181 n.15 (5th Cir. 1988); *American Electric*, 418 F. Supp. at 452 n.25.[13]

We hold that McDermott has no claims against AmClyde, except for breach of the limited warranty in their contract. We reverse this portion of the judgment of the district court.[14]

V.

Turning to River Don, McDermott's contention that it should have been allowed to proceed against River Don for a breach of warranty is unclear. On one hand, McDermott states it "was *not* allowed to proceed in contract against River Don for any damages but was restricted to tort damages by River Don to the deck section alone," and "[t]he court, inexplicably, would not allow any evidence of contract remedies that River Don would owe to McDermott, Inc., directly or as third party beneficiary, per Article XV." On the other hand, McDermott says "the evidence adduced at trial demonstrated that River Don made express and implied warranties regarding the Hook

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[13] The exculpatory provision's preclusion of liability in tort bars McDermott's misrepresentation claim as well. Therefore, the jury's finding of a misrepresentation defect was of no legal significance.

[14] Because we reverse the judgment against AmClyde, we need not address AmClyde's other assignments of error.

which were communicated to McDermott with the expectation that these representations would be relied upon." Regardless, McDermott has not preserved this issue for appeal.

The magistrate judge did not rule on McDermott's contract claim against River Don. The magistrate relied upon *East River* in ruling that McDermott could recover in tort for the damage to the deck but not to the crane. Without objection, the district judge submitted only McDermott's warranty claims to the jury.

VI.

River Don argues that the exculpatory provision in the McDermott-AmClyde contract protects it as well as AmClyde from liability in tort. River Don relies on *Aeronaves De Mexico, S.A. v. McDonnell Douglas*, 677 F.2d 771 (9th Cir. 1982). In that case, an airplane's landing gear failed. Aeromexico sued the manufacturer of the plane, McDonnell Douglas, and the subcontractor who manufactured the landing gear assembly, Menasco. *Id.* at 772. The contract between Aeromexico and McDonnell Douglas contained a warranty provision, similar to that in the McDermott-AmClyde contract, barring a negligence action against McDonnell Douglas. *Id.* at 773. Aeromexico did not contest the validity of that provision but on appeal argued that the exculpatory provision did not bar its suit against Menasco, because Aeromexico and Menasco were not in privity. The court rejected this contention, concluding that recovery by Aeromexico from Menasco would be a windfall. The court relied on the fact that if Aeromexico were allowed to sue Menasco directly,

Menasco could file a third party claim against McDonnell Douglas. *Id.* In fact, the district court found that the contract between McDonnell Douglas and Menasco permitted such a claim. *Id.* at n.4. The liability would be visited upon McDonnell Douglas, "thus nullifying the contractual allocation of risks" between McDonnell Douglas and Aeromexico. *Id.* at 773.

We decline to apply the rationale of *Aeronaves de Mexico*. We are mindful of the fact that we must apply New York law to interpret the McDermott-AmClyde contract. We are not persuaded that New York would here abandon the rule of privity. If River Don had a claim against AmClyde and thus could shift ultimate liability to AmClyde, this fact would not persuade us that McDermott is barred from recovering against River Don. If AmClyde wanted to prevent River Don from shifting liability, AmClyde could have sought this protection from River Don in their subcontract. AmClyde only warranted equipment of its own manufacture. The contract did not preclude McDermott from suing other manufacturers.[15]

River Don's tort liability turns then on the *East River* doctrine. In *East River Steamship Corp. v. Transamerica Delaval. Inc.*, 476 U.S. 858, 871 (1986), the Supreme Court held that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products liability theory to prevent a product from injuring itself."

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[15] Article XV provides in part: THE BUYER AGREES THAT IT MUST RELY SOLELY ON THE MANUFACTURER'S WARRANTIES APPLICABLE, AND THAT IT SHALL HAVE NO REMEDY AGAINST THE SELLER FOR BREACH OF A MANUFACTURER'S WARRANTY.

The Court reasoned that when the only damage is economic loss to the product itself, the purchaser has simply lost the benefit of its contractual bargain and should be limited to its contractual warranty remedies. *Id.* at 872-876.

McDermott argues that *East River* does not shield River Don from tort liability, because River Don is not a party to the contract between McDermott and AmClyde. In *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925, 929 (5th Cir. 1987), we held that under *East River* there is "no rational reason to give the buyer greater rights to recover economic losses for a defect in the product because the component is designed, constructed, or furnished by someone other than the final manufacturer." Allowing such a recovery would "undermine the objective of *East River* that the parties receive the benefit of their bargain." *Id.; see also Nathaniel Shipping, Inc. v. General Elec. Co.*, 920 F.2d 1256, 1263-64, *modified*, 932 F.2d 366 (5th Cir. 1991). Thus, *East River* applies to River Don.

East River applies when the action is for damage to the product itself and not for damage to "other property." *Shipco*, 825 F.2d at 929. Therefore, the issue in this case is whether the deck is "other property" so as to escape *East River*'s bar to recovery in tort. We ask "what is the object of the contract or bargain that governs the rights of the parties?" *Id.* at 928; *see also Petroleum Helicopters, Inc. v. Avco Corp.*, 930 F.2d 389, 393 n.9 (5th Cir. 1991); *Nicor Supply Ships Assocs. v. General Motors*, 876 F.2d 501, 505 (5th Cir. 1989).

River Don argues that the deck is not "other property," because McDermott owns the deck as well as the

crane, pointing to *Nicor*. Nicor Supply Ships chartered its vessel to Digicon. Digicon then installed structures and equipment on the vessel for use during the term of the charter. A fire damaged the ship and Digicon's equipment. Nicor and Digicon sued several parties. 876 F.2d at 502-03. *East River* barred Nicor's claim for damage to the ship. Digicon's claim for damage to its equipment survived "[b]ecause these items were not part of the contract under which the vessel was sold." *Id.* at 506. The decision did not turn on Digicon's ownership of the damaged equipment. The object of the McDermott-AmClyde contract was the manufacture, design, and sale of the crane, and that is the relevant inquiry. The deck was not the object of the sales contract rather the deck is "other property."

McDermott argues that River Don is liable for damage to the crane, because when a plaintiff suffers damage to "other property", *East River* allows recovery of *all* damages. *East River* allows recovery for damage to other property, 476 U.S. at 875-76, but when there is damage to other property, recovery for the loss to the product itself is still in contract and not tort. We emphasized this point in *Nicor*. Speaking of Digicon's recovery in tort, we stated

> [h]aving sustained "physical injury to a proprietary interest," Digicon may recover for economic loss as well, *but its recovery for loss of profits is limited to losses resulting from its inability to use the "other property" it placed on the vessel as a result of the casualty*. Digicon is not entitled to recover for its loss of profits resulting from its inability to use the vessel itself or for its inability to use the "other property" if that resulted solely from the disability of the vessel itself.

876 F.2d at 506 (emphasis added). Therefore, this contention is without merit.[16] The trial court correctly applied *East River* to allow McDermott's recovery against River Don for damage to the deck, but not the crane.

VII.

River Don argues that McDermott failed to prove causation. We review the evidence in the light most favorable to McDermott. *Martin v. American Petrofina, Inc.*, 779 F.2d 250 (5th Cir. 1985). The verdict stands if reasonable jurors could reach different conclusions. *Id.* We decline to disturb the verdict.

At trial, McDermott and river Don offered different theories of causation. McDermott argued that the hook was defective, and the defect caused the hook to break. River Don conceded that the hook contained flaws but argued that McDermott's use of a right hand to left hand cable laid sling arrangement caused the hook to break. That is, McDermott's sling arrangement allowed the slings to rotate during the lift. This rotation caused the slings to break first, putting more stress on the hook than it was designed to handle.

McDermott offered the testimony of Dr. Kenneth Packer, an expert in foundry practice, welding, and metallurgy. Packer testified that the hook contained a flaw that caused the hook to fail; that the hook broke first. On

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[16] McDermott also attempts to circumvent *East River* by arguing that the decision is inapplicable to the crane a product that is unreasonably dangerous. The Supreme Court rejected this distinction *East River*. 476 U.S. at 869-70.

cross-examination, Dr. Packer testified that the hook was flawed when it left River Don's foundry.

River Don argues that Dr. Packer failed to substantiate McDermott's theory of causation and could not discount other plausible theories, namely that the slings broke first. River Don refers to the fact that the crane, with the flaw, lifted objects weighing as much or more than the deck before the accident and in fact successfully lifted the deck on one occasion. Therefore, River Don argues that the flaw could not have caused the hook to fail.

We find that McDermott presented sufficient evidence for the jury to conclude that hook failure caused to deck to fall. *See Brown v. Parker-Hannifin Corp.*, 919 F.2d 308, 312 (5th Cir. 1990) ("To establish causation, [plaintiff] need not rule out every conceivable explanation for the failure . . . "). First, the jury could have reasonably inferred that the flaw in the hook caused it to break. The jury could have considered the presence of the flaw in earlier lifts in evaluating the likelihood that the hook caused the accident, but the presence of the flaw from the beginning does not eliminate it as a cause of the accident. Second, Dr. Packer was not the only witness to testify that the hook failed first. Steven Whitcomb, a project manager at Hudson Engineering, prepared a report on the cause of the accident. The report was based on a computer analysis of the two theories of causation, hook failure and sling failure. He delivered this report in a presentation to AmClyde. At trial, he testified about his report to AmClyde in which he concluded that the hook failed first

and was the cause of the accident. McDermott also presented eye witnesses to the accident who testified that the hook broke first.

VIII.

River Don contends that any judgment rendered against it must be offset by the $1 million settlement between McDermott and the sling defendants under *Hernandez v. M/V RAJAAN*, 841 F.2d 582 (5th Cir. 1988). *Hernandez* held that a maritime plaintiff "is entitled to receive a full damage award less any amount he recovered in a settlement with third-party defendants." *Id.* at 591; *see also Constructores Tecnicos v. Sea-Land Serv., Inc.*, 945 F.2d 841 (5th Cir. 1991); *Rollins v. Cenac Towing Co.*, 938 F.2d 599 (5th Cir. 1991); *Myers v. Griffin-Alexander Drilling Co.*, 910 F.2d 1252 (5th Cir. 1990). This rule of setoff "ensure[s] that the plaintiff does not recover more than the damages determined at trial." *Constructores*, 945 F.2d at 850.

McDermott argues that *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979), states the law of this circuit and does not entitle River Don to a dollar-for-dollar credit. A recent panel of this court suggested that it is unclear whether *Leger* or *Hernandez* provides the rule of settlement credit in this circuit. *See Hardy v. Gulf Oil Corp.*, 949 F.2d 826, 835 (5th Cir. 1992). Judge Brown wrote a concurring opinion to emphasize the need to resolve this conflict en banc. *Id.* at 836. However, we think that *Hernandez* is the law of this circuit. The panel in *Myers* attempted to make this point clear:

> we read *Hernandez* as adopting the reasoning of the Eleventh Circuit opinion in *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), which declined to follow *Leger* on grounds that *Leger* was inconsistent with *Edmonds v. Compagnie General Transatlantique*, 443 U.S. 256, 99 S. Ct 2753, 61 L. Ed. 2d 521 (1979).

Myers, 910 F.2d at 1256.

Until the Eleventh Circuit decided *Self*, *Leger* was binding precedent in that circuit as well as our own. *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc) (adopting as binding precedent all decisions of the former Fifth Circuit handed down before the close of business on September 30, 1981). In *Self*, the Eleventh Circuit decided that *Leger*'s pro rata approach to settlement credit was inconsistent with the Supreme Court's opinion in *Edmonds*. Thus, in *Self*, the Eleventh Circuit returned to the pro tanto or dollar-for-dollar approach to credit set out in our earlier opinion in *Billiot v. Seward Seacraft*, 382 F.2d 662, 664-65 (5th Cir. 1967). We had abandoned *Billiot in Leger* based on *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975). Today, there is no doubt in the Eleventh Circuit that *Self* overruled *Leger*. *Great Lakes Dredge & Dock Co. v. Tanker*, 957 F.2d 1575, 1580 (1992).

In *Hernandez*, we explicitly adopted the Eleventh Circuit's reasoning in *Self*. Therefore, we also overruled *Leger* as precedent in this circuit and returned to the rule in *Billiot*. *See, e.g., Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir. 1991) (a panel may ignore the decision of a prior panel in the event of a superseding decision by the Supreme Court). Since *Hernandez*, we have applied its

dollar-for-dollar approach. *See Constructores*, 945 F.2d 841; *Rollins*, 938 F.2d 599; *Myers*, 910 F.2d 1252. Two recent panels cited *Leger*, suggesting that it remains good law. *See Empresa Lineas Maritimas v. Schichau-Unterweser*, 955 F.2d 368, 374 (5th Cir. 1992); *Teal v. Eagle Fleet, Inc.*, 933 F.2d 341, 346 (5th Cir. 1991). However, they did not apply the *Leger* approach. We continue to apply *Hernandez* in calculating settlement credit.

The district court refused to allow any set-off, concluding that McDermott would not be paid for more than its injury, because *East River* left it otherwise uncompensated for the damage to the crane. This is true, but not relevant. The jury determined that McDermott's total loss for the damage to the deck was $2.1 million, $1.47 million after a reduction of 30% for the responsibility attributed to McDermott/sling defendants. $1.47 million is McDermott's "full damage award." It cannot recover more. We must then deduct the *Hernandez* credit.

This requires us to address McDermott's post-trial revelation that half of the settlement was allocated to the crane and half to the deck. McDermott urges that because River Don is only liable for the deck, it is only entitled to credit for that part of the settlement covering damage to the deck. River Don urges us not to consider this allocation, because it was made after trial, it was not a party to the agreement and the settlement is not in the record.

We see little reason to give effect to this allocation and strong reasons not to do so. Where defendants are potentially liable for the same damages and less than all defendants settle, uncertainty of the effect upon the non-settling defendants does little to facilitate settlement and

may well frustrate the single recovery rule itself. A plaintiff should not be able to wait for the jury's verdict to allocate the settlement in a way that reduces the remaining defendants' credit. *See King Cotton, Ltd. v. Powers*, 409 S.E.2d 67, 70 (Ga. Ct. App. 1991); *see also Alexander v. Seaquest Inc.*, 575 So. 2d 765, 766 (Fla. Dist. Ct. App. 1991) (apportionment of settlement comes too late if done after jury verdict, because nonsettling tortfeasors lose the right to settle); *Dionese v. City of West Palm Beach*, 500 So. 2d 1347, 1351 (Fla. 1987) (disclosure of settlement's terms may lead the non-settling defendant to settle instead of going to trial).

Rejecting McDermott's allocation of one-half to the crane and one-half to the deck leaves two options. We could apportion the settlement ourselves, or use the entire sum in calculating any credit due River Don. We decline the first option. *See Lendvest Mortgage, Inc. v. De Armond*, 123 B.R. 623, 624-25 (Bankr. N.D. Cal. 1991) (rather than attempt to allocate a settlement, a court should offset the entire amount). There is no evidence in the record concerning McDermott's damages to the crane. A remand to the trial court offers no solution.

Including the full amount of McDermott's settlement in calculating any credit due river Don is the best solution. *See U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1262 (10th Cir. 1988) (where nonsettling defendants are not privy to settlement negotiations, burden shifts to plaintiff to show that settlement did not represent common damages); *see also Hess Oil Virgin Islands Corp. v. UOP, Inc.*, 861 F.2d 1197 (10th Cir. 1988) ("If [plaintiff] wanted to have any particular application of its settlement with the settling defendants toward [nonsettling

defendant's] liability, it should have specifically stipulated in the settlement documents what allocations of damages were applicable to each cause of action."); *but see Force v. Director, OWCP, Dept. of Labor*, 938 F.2d 981, 985 (9th Cir. 1991) (defendant-employer bears burden of proving settlement allocation, because the LHWCA's policy "of compensating employees for their injuries requires that 'all doubtful questions of fact be resolved in favor of the injured employee' ").

McDermott had a claim against the sling defendants for damage to the crane and the $1 million payment obtained a release of that claim as well as the claim for damage to the deck. It was McDermott's burden to demonstrate that its jury award did not exceed its right to full compensation for a particular injury. McDermott has not met its burden of demonstrating that the proceeds of the settlement with the sling defendants were for damage to the crane and not the deck. We hold that the entire $1 million should be included in calculating any credit due River Don. *See U.S. Industries*, 854 F.2d at 1262-63; *Hess Oil*, 861 F.2d at 1209; *Lendvest Mortgage*, 123 B.R. at 625. *Alexander*, 575 So. 2d at 765; *King Cotton*, 409 S.E.2d at 70; *Dionese*, 500 So.2d at 1349.[17]

Applying *Hernandez*, McDermott's full damage award is $1.47 million ($2.1 million jury verdict less 30% attributed to McDermott/sling defendants). We then deduct the $1 million received in settlement to reach

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[17] Our conclusion that River Don is entitled to credit for McDermott's settlement makes consideration of River Don's alternative argument for a new trial based on evidentiary rulings unnecessary.

$470,000. By the jury's finding, River Don is liable to McDermott for its portion of McDermott's loss (38% of $2.1 million or $798,000). However, McDermott is only entitled to recover an additional $470,000 from any defendant. We therefore modify the judgment against River Don for $798,000, and enter judgment against River Don and in favor of McDermott in the amount of $470,000.

It does not follow that McDermott's decision at trial to assume the fault of the sling defendants was unwise. To the contrary, this tactical move made more difficult any effort of River Don and AmClyde to lay any fault on the absent sling defendants. But for this move the jury may well have been persuaded that the sling defendants were liable for more than 30% and the other defendants, including River Don for less. Seen in the light of these realities of trial, this result makes sense.

IX.

McDermott claims pre-judgment interest. The jury awarded no interest. McDermott does not challenge the jury instruction,[18] which tracked the law of this circuit.[19]

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[18] The jury was charged as follows:
In admiralty cases, the award of pre-judgment interest from the date of the loss is the rule rather than the exception. The decision to deny pre-judgment interest must be based on the existence of peculiar circumstances because pre-judgment interest is awarded as a compensation for a wrong done. It is your responsibility to determine whether to award McDermott, Inc. pre-judgment interest. If you determine that the – that the Plaintiff is entitled to pre-judgment interest; that is, interest from the date of the loss until the date you render your verdict, you must determine the rate at which the interest will be calculated. The

circumstances which may justify denial of an award for pre-judgment interest are as follows: A genuine dispute over a good faith claim exists in a mutual fault situation – mutual fault setting; the damages awarded are substantially less than the amount claimed by the Plaintiff; the Plaintiff's contributory negligence is to such a magnitude as to make and award of pre-judgment interest inequitable.

[19] McDermott refers us to Texas, New York, and Louisiana law; however, pre-judgment interest on a maritime tort claim is governed by general maritime law. *Wyatt v. Penrod Drilling Co.*, 735 F.2d 951, 955 (5th Cir. 1984); *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048, 1053 (5th Cir. 1973).

See Orduna S.A. v. Zen-Noh Grain Corp., 913 F.2d 1149, 1157 (5th Cir. 1990) (noting the reasons for denying pre-judgment interest). Rather, McDermott argues that the circumstances justifying denial of pre-judgment interest were not present in this case. We disagree.

The jury could have found there was a genuine dispute over a good faith claim in a mutual fault setting. "Our cases have consistently upheld denials of prejudgment interest in cases of apportioned fault." *Inland Oil and Transport Co. v. Ark-White Towing Co.*, 696 F.2d 321, 328 (5th Cir. 1983). In this case, the jury assessed responsibility 32% to AmClyde, 38% to River Don, and 30% to McDermott/Sling defendants. *See id.* (upholding a denial of pre-judgment interest where the plaintiff was found to be 25% at fault).

X.

Finally, McDermott asks us to correct the judgment to show that the jury apportioned causation and not fault. The judgment paraphrased the jury verdict as follows:

"thirty percent (30%) *fault* allocated to plaintiff, McDermott, Inc., thirty-two percent (32%) *fault* allocated to AmClyde, a Unit of AMCA International Corporation, and thirty-eight percent (38%) *fault* allocated to River Don Castings, Ltd." (emphasis added). McDermott contends that the judgment incorrectly paraphrased the jury's verdict which allocated *causation* and not fault. Interrogatory #5 asked:

> You have been instructed that the failure of the sling at a load less than its rated minimum breaking strength is a cause of damage to the deck and crane. If you have also answered interrogatories 1 and 2 "yes," please state what proportion or percentage of plaintiff's damages you find from a preponderance of the evidence to have been legally *caused by the fault* of the respective parties?

We agree that in answering this interrogatory the jury determined the percentage of injury caused by each defendant.

REVERSED in part and AFFIRMED as modified in part.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2246

McDERMOTT, INC.,

Plaintiff-Appellee,
Cross-Appellant,

versus

CLYDE IRON, ET AL.,

Defendants,

RIVER DON CASTING LTD.,

Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Filed Jan. 25, 1993)

(Opinion 12/11/92, 5 Cir., ___, ___ F.2d ___)
(January 25, 1993)

Before HIGGINBOTHAM and DUHÉ, Circuit Judges, and HARMON,* District Judge.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having

requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham
United States Circuit Judge

• District Judge of the Southern District of Texas sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

McDERMOTT, INC., Plaintiff	§	
v.	§	C.A. H-88-2429
CLYDE IRON, ET AL., Defendants	§	

JURY INTERROGATORIES

1. Do you find from a preponderance of the evidence that the hook was defective in any of the ways alleged?

ANSWER: Yes X or No _

December 7, 1990 (DATE) /s/ Illegible (FOREPERSON)

If you answered "Yes," go to Interrogatory Number 2.

If you answered "No," go to Interrogatory Number 12.

2. If the answer to Interrogatory Number 1 was "Yes," do you find by a preponderance of the evidence that the defect was a legal cause of damages?

ANSWER: Yes X or No _

December 7, 1990 (DATE) /s/ Illegible (FOREPERSON)

If you answered "Yes," go to Interrogatory Number 3.

3. If the answers to Interrogatories Number 1 and 2 were yes, do you find from a preponderance of the evidence that the defect was:

(a) One of design?

ANSWER: Yes _ or No X

(b) One of materials or workmanship?

ANSWER: Yes X or No _

(c) A failure to warn?

ANSWER: Yes _ or No X

(d) One of misrepresentation?

ANSWER: Yes X or No _

December 7, 1990 /s/ Illegible
(DATE) (FOREPERSON)

4. If the defect was one of materials or workmanship, do you find by a preponderance of the evidence that the negligence or fault of any of the following was a cause of the defect:

(a) River Don Casting?

ANSWER: Yes X or No _

(b) AmClyde?

ANSWER: Yes X or No _

(c) McDermott, Inc.?

ANSWER: Yes _ or No X

December 7, 1990 /s/ Illegible
(DATE) (FOREPERSON)

5. You have been instructed that the failure of the sling at a load less than its rated minimum breaking strength is a cause of damage to the deck and crane. If you have also answered interrogatories 1 and 2 "yes," please state what proportion or percentage of plaintiff's damages you find from a preponderance of the evidence to have been legally caused by the fault of the respective parties?

Answer in terms of percentages:

AmClyde	32	%
River Don Casting	38	%
McDermott/Sling defendants	30	%
Hudson Engineering	0	%
TOTAL	100	%

(NOTE: The total should equal 100%)

December 7, 1990 /s/ Illegible
(DATE) (FOREPERSON)

6. Do you find by a preponderance of the evidence that AmClyde breached any express warranties in addition to the manufacturing warranty found in the original contract in regard to the hook as alleged by plaintiff?

ANSWER: Yes X or No _

December 7, 1990 /s/ Illegible
(DATE) (FOREPERSON)

7. If so, do you find that AmClyde's breach of these express warranties was a producing cause of the damages suffered by McDermott, Inc.?

ANSWER: Yes X or No _

December 7, 1990 /s/ Illegible
(DATE) (FOREPERSON)

8. Do you find by a preponderance of the evidence that AmClyde breached any implied warranties in regard to the hook as alleged by plaintiff.

ANSWER: Yes X or No _

December 7, 1990 /s/ Illegible
(DATE) (FOREPERSON)

9. If so, do you find that AmClyde's breach of implied warranty was a producing cause of the damages suffered by McDermott, Inc.?

ANSWER: Yes X or No _

December 7, 1990 /s/ Illegible
(DATE) (FOREPERSON)

10. What sum, in dollars, without regard to the percentages of fault of any party, do you find from a preponderance of the evidence, is required to compensate McDermott, Inc., for the damages to the deck as a result of this accident?

$ 2,100,000.00

December 7, 1990 /s/ Illegible
(DATE) (FOREPERSON)

11. Do you find by a preponderance of the evidence that McDermott, Inc., is entitled to pre-judgment interest?

ANSWER: Yes _ or No X

If so, what % interest?

%_____

December 7, 1990 /s/ Illegible
(DATE) (FOREPERSON)

12. Do you find by a preponderance of the evidence that AmClyde is entitled to be compensated for the replacement of the hook and associated charges.

ANSWER: Yes _ or No X

December 7, 1990 /s/ Illegible
(DATE) (FOREPERSON)

If you answered "yes," go to Interrogatory Number 13.

13. State what sum, in dollars, without regard to the percentage of fault of any party, do you find from a preponderance of the evidence, is required to compensate AmClyde for the replacement of the hook?

$ _____

_____ _____
(DATE) (FOREPERSON)

* * *

[p. 59] **MR. LEA:** We maintain that River Don does not get benefit of ***East River*** because we don't have any contractual relationship with them. That's different now than Clyde. I understand if we have a contractual relationship with Clyde according to your ruling, if the contract says it, that's all we get. But we don't have anything with River Don and the effect of holding that we're limited to a non-existent contract is to give somebody with whom you don't have a contract absolutely (sic) immunity when they go offshore. And I – I feel strongly that's not the law.

THE COURT: I may be wrong on it, but that – as I see it, that's –

MR. LEA: So it – you're ruling that way on River Don, too, just for clarification purposes? Not just Clyde with whom we have –

THE COURT: It would be on the crane. I don't know that you would have anything on River Don.

MR. LEA: And so I can't mention that?

THE COURT: No.

MR. LEA: Okay. I will structure my – my arguments accordingly.

THE COURT: But now I think River Don will certainly be liable as far as that snapper deck goes.

MR. LEA: All right, sir.

THE COURT: I think you're getting –

* * *

[p. 976] **MR. MOSELEY:** Let's wait till we have –

MR. O'BRIEN: If Dr. Packer comes to testify, then we'll –

MR. COUHIG: Then we'll raise the issues.

MR. MOSELEY: Yeah. I mean, that – that's –

MR. COUHIG: That's fine.

MR. MOSELEY: – see whether we have a problem. Now, on – your Honor, just to make it clear because something that Mr. O'Brien – I understand the ruling of the Court was that with regards to the object itself, the crane, that we were prevented from putting on any issue of damages with regards to that because our only remedy was – was replacement of the hook?

THE COURT: Damages; yes. I think – I think that's exactly – I think East River just says that as far as that crane goes, that is the unit damage in itself, and I think that –

MR. MOSELEY: I've only prepared damages with regards to the deck, and that's what I've got my witness here for, so any – any documents regarding the – the crane itself, I have excluded from – from those – the documents which I had in a – a package and, in effect, those are reserved for whatever issues on appeal should we need them, I suppose, all the things regarding cranes. I just wanted to make that sure that we're only putting the deck claim forward at this point.

THE COURT: Well, now, I –

MR. MOSELEY: It's my under –

[p. 977] **THE COURT:** If you, for – I mean, you may be able to get in what it cost to recast the hook; I don't know, if they've charged you for it.

MR. MOSELEY: They charged; we didn't pay them.

THE COURT: Oh, well, if you had paid them and you have got your hook, well, you know, I –

MR. MOSELEY: Right. Our claims was that, you know, if you're – in effect, if you're correct on East River then we don't have that, and that's what you've ruled. If –

THE COURT: Well, I think – you know, and even that – even that case – the Connecticut case that you – I read both of those. I read that one and then the other case that – there's a Nicor (sp.ph.) case or whatever it is. I think that Nicor – Judge Rubin in that case goes through and he – he mentioned that concern I had on that Dreyfus case and the Oxy case, talking about cargo and this, that, and the other.

MR. MOSELEY: And he – And he –

THE COURT: And he said, look, that's all – That's all dicta anyway. I didn't see that it was dicta, but –

MR. MOSELEY: Yeah, he called it dicta.

THE COURT: Judge Rubin says that it's dicta, and so he's say – if there is other – if there is other property and it doesn't say – it doesn't talk about ownership of that other property. I understand how the defendants are trying to distinguish that, but –

[p. 978] **MR. MOSELEY:** Your honor, I –

THE COURT: – to me, that deck is other property; if other property is going to have any meaning.

MR. MOSELEY: Yeah, I – I have no doubt about that, that part of the ruling. I was only talking about the part where it limited our contractual remedy –

THE COURT: I think East River limits your contractual remedies and –

MR. MOSELEY: That's the reason I'm not putting –

THE COURT: Now, the Connecticut case, you know, it's true enough, when they had that guy blown away or – or – well, in fact, they had a bunch of them killed in that, I think fourteen or fifteen, and they let them – they – I agree, they –

MR. MOSELEY: All I'm saying, Your Honor, I disagree because of the contractual issues as I put in my memorandum, and that breach of contract, failure of (indiscernible) purpose, and those other ones would abrogate that, and that's all in my Brief. All I'm saying now is as a result of your ruling, I'm only putting on damages with regards to the deck and should we prevail on the other issues, those documents are available to the Court.

THE COURT: Well, I think that's –

MR. COUHIG: Judge, lest I be chastised upon my return home, I have there this weekend with the assistance of others, a memorandum in opposition to Plaintiff's Motion to Reconsider [p. 979] even though it's already been denied, I'd like to file it in the record.

THE COURT: Well, is there anything in there that might make me reconsider – reconsider what now?

MR. COUHIG: He wanted to come back and – and try and get all the claims, and this is just to support your ruling.

THE COURT: Oh, this supports my ruling?

MR. COUHIG: Yes, sir.

THE COURT: Oh –

MR. COUHIG: So it's very favorable.

THE COURT: Very well.

MR. COUHIG: Now, Judge, having given you with one hand, I take away with the other. We have, and I delivered to you, a letter that contains copies of the Briefs filed in the Oxy producer and Employees Insurance of Wausau case.

THE COURT: Well, that is the Oxy producer –

MR. COUHIG: I'm sorry. I – I'm reading two things at once.

THE COURT: You're talking about the Dreyfus case?

MR. COUHIG: No, sir. I'm talking about Oxy producer. The memorandum of – of – or the appellee Brief of the plaintiff and the appellant's Brief of the defendants, the reason we give you that, sir, is I think that the discussion on other property are relevant to that which we have – have argued already. Rockne, I don't know where your copies are. I –

[p. 980] **MR. MOSELEY:** The only – The only thing I would object to again is since that was made no part of the decision that it is just pure argument, and the decision does not address that particular issue.

THE COURT: Well, Judge – Judge Rubin in this – I think it's the Nicor case –

MR. MOSELEY: Nicor, Judge.

THE COURT: – which you cited to me that I promptly went out and read says all that discussion is dicta anyway. You're talking about the – the – the distinguishes being cargo from –

MR. COUHIG: Yes, sir.

MR. SPEAKER: And we – we cited that to the Court.

MR. COUHIG: As you will recall, I felt that in fairness to you I should do it although –

MR. MOSELEY: Your Honor –

MR. COUHIG: I think when you get into the philosophy and we don't need to argue it although it is an interesting area of law, the philosophy of commercial relationships, not just in maritime law but outside of maritime law, it is obvious that what the Court's are saying is strike your commercial bargain and go after that.

THE COURT: It's – If it is that product only, and then if they say you have other property – what's other property to me?

[p. 981] **MR. COUHIG:** You and I have had our disagree –

THE COURT: You say it means property owned by someone else –

MR. COUHIG: Yes –

MR. MOSELEY: Your honor, in fairness –

MR. COUHIG: Someone who's not a party to the commercial relationship.

MR. MOSELEY: In fairness to Mr. Couhig, I think in many degrees, he supports part of his argument where he talked about other property in – in Oxy producer which –

THE COURT: Oh, was Oxy producer your case?

MR. SPEAKER: Yes, Judge

THE COURT: Oh, I didn't realize that was your case then.

MR. MOSELEY: It wasn't – It wasn't the fact though addressed in the decision Oxy producer. There was always some question to, at least in mind in reading Oxy producer because it was obviously that there was some cargo and some damage to beaches and things like that, but the decision –

THE COURT: Well, I will read both of these and as you see, I will change my mind if you – if you show me I'm different; I meant, if I'm wrong, but –

MR. MOSELEY: The only – The only concerns I have that contractual issues with regards to third party

beneficiary of Clyde's warranty between themselves and River Don, (indiscernible) essential purpose in those contractual issues which it –

[p. 982] **THE COURT:** Well, see, even your (indiscernible) essential purpose, you're saying that mere – if it had been like in see the – well, I don't – well, it wasn't the Oxy producer –

MR. COUHIG: Oxy producer (indiscernible) bottom –

THE COURT: – it was one of the other –

MR. COUHIG: – of the ocean.

THE COURT: Went to the bottom of the ocean where the warranties do, but you're saying the – and as I understand it now, and I – You're saying the only failure of purpose of the warranty was the fact that they didn't do it cost free to you, and if they had done it and hadn't billed you for it, then –

MR. MOSELEY: They would've fulfilled their obligation.

THE COURT: – there wouldn't have been failure of purpose?

MR. MOSELEY: Right. They basically put themselves in a position of having to repair it free of charge, and then – and then they'd say that they're not to give us one without a purchase order and not going to do anything, and, you know, so what kind of – what kind of commercial relationship is that when you can't rely on your contract? That's – You're not getting the benefit of you – of your contract.

THE COURT: Well –

MR. MOSELEY: Your Honor, I'm just saying that those – those issues are obviously still reserved –

[p. 983] **THE COURT:** All right.

MR. MOSELEY: – because if any of those are approved, I would be entitled to those damages.

THE COURT: All right. Well, I will – I will read this over but I think this is probably going to be one point – see, because I had initially – even before I read in your deal where it said – after I read that East River case, I took that position and then I saw in one of your deals you said that the court's taking the position that that's splitting the baby, and that was precisely what I was doing; not that I was splitting the baby, I thought that was called for because if that East River – when they start talking about other property –

MR. MOSELEY: But, Your Honor, with regards to – in fairness to myself, with regards to that memorandum I – I wrote that was dealing with AmClyde. It was not until arguments in – in chambers which I came in, as you know, only halfway, and it took me a while to come up to speed. That dealt with River Don which is a separate issue altogether.

THE COURT: Well, I will read this, but –

MR. COUHIG: As I say, the issues are actually – you don't get across many still interesting issues in the law, and this, I think, is one.

THE COURT: Well, then, it's something that the Fifth Circuit needs to answer for the – for the benefit of –

is this same thing going to be involved in Judge Healey's (sp.ph.) case?

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[p. 2960] **THE COURT:** All right. Go on the record.

MR. MOSELEY: Your Honor, at this time, in order to clarify the situation with regards to P-4, McDermott Exhibit 4, since P-4, as it now exists as admitted evidence to the jury is summary of damages sent to the jury. We had offered supporting documents for those damages as a proffer, and we also had proffered our summaries of damage to the crane and supporting documents. Since P-4, as it exists now, is strictly summaries of the deck damage, we suggest to make the record clear that we enter as P-351 the summaries for the crane damage and the associated damage documents, and 352, as the documents in support of the deck damages, and proffer those to the Court separately from P-4 so there is no confusion. In addition to that, those same documents had been proffered by counsel for Clyde and River Don under their own numbers, and that those be referenced by reference incorporated in, and refer those Amclyde Exhibit numbers to the McDermott Exhibit numbers for purposes of proffer.

MR. O'BRIEN: Specifically, on behalf of Clyde, our Exhibits 556, 570, 579, and 596, 598 through 601, 608, 609,

611, 614, 615, 632, 633, and 646 are included in Mr. Moseley's Exhibits.

MR. MOSELEY: P-351 and P-352.

MR. O'BRIEN: And then we are withdrawing Exhibits 636 and 641, by mutual consent of the parties.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

McDERMOTT, INC., Plaintiff v. CLYDE IRON, ET AL., Defendants	§ § § § § § § §	C.A. H-88-2429 MEMORANDUM/ ORDER (Filed Jan. 17, 1991)

Defendants AmClyde and River Don Castings move the Court to assign a credit in the amount of One Million Dollars ($1,000,000.00) toward satisfying the Two Million, One Hundred Thousand Dollars ($2,100,000.00) damages awarded to plaintiff for which the two defendants were found to be seventy per cent (70%) responsible. Defendants assert that this apportionment must be made pursuant to *Hernandez v. M/V Rajaan*, 841 F.2d 582 (5th Cir. 1988) to prevent a double recovery by plaintiff for his damages.

The Court disagrees that *Hernandez* requires the grant of an automatic credit in all cases to non-settling defendants found liable for damages when a pre-trial settlement has been concluded between plaintiff and one or more settling defendants. The purpose of a *Hernandez* credit is to prevent a damage award in excess of a plaintiff's actual injuries suffered. The plaintiff in *Hernandez* received in the trial court a full award for his injuries from the sole defendant electing to proceed to trial. Indeed, plaintiff was even awarded excess damages and the appellate court ordered a remitter in the case. Hernandez received a full recovery for his damages from the

defendant tried and would have received a double recovery to the extent of his settlement with other defendants before trial.

Plaintiff here did not receive a full recovery for the total damages sustained by him in this case. Because *East River S. S. Corp. v. TransAmerica Delaval*, 476 U.S. 858 106 S.Ct. 2295 (1986), precluded any recovery by plaintiff under a products liability theory for damages to the Shearleg crane, a major portion of plaintiff's damages were taken from the jury 's consideration. Defendants are of the view that since plaintiff had no viable products liability claim under *East River* for loss of the Shearleg crane and no warranty or contractual claims against the settling defendants for that loss, the plaintiff has received by the jury award the full recovery to which he is entitled for his damages.

Defendants further object to the apportionment of the settlement between damages to the Shearleg crane and to the snapper deck. Again, the Court disagrees. The fact that plaintiff may have no legal claim enforceable in court against a defendant for whatever reason does not negate the fact that plaintiff here did, in fact, suffer substantial damages in excess of that recovered by the jury verdict and the settlement. Plaintiff has not, in this Court's opinion, made a double recovery which must be corrected by a *Hernandez* credit to the non-settling defendants. To hold as the defendants request would result in the settling defendants, who were at the most thirty per cent (30%) responsible for the accident (no separate contributory negligence, if any, finding was made as to McDermott), paying One Million Dollars ($1,000,000.00) while the defendants who insisted on a trial and were

found to be seventy per cent (70%) liable would pay Four Hundred and Seventy Thousand Dollars ($470,000.00) between them. That is unjust and clearly is not required by *Hernandez*. It is therefore,

ORDERED that defendants' motion for a *Hernandez* credit is DENIED.

The Clerk shall enter this Order and provide a copy to all parties.

DONE at Houston, Texas, on this the 4th day of January, 1991.

/s/ George A. Kelt, Jr.
GEORGE A. KELT, JR.
United States Magistrate
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

McDERMOTT, INC., Plaintiff	§	C.A. H-88-2429
	§	JUDGMENT
v.	§	(Filed Jan. 17, 1991)
CLYDE IRON, ET AL., Defendants	§	

This matter came on for trial on the merits before the Court and the Jury, Honorable George A. Kelt, Jr., United States Magistrate Judge, presiding; and plaintiff, having compromised its claims against defendants, British Ropes, Ltd., International Southwest Sling, Inc., and Hendrik Veder, b.v., prior to trial for a total amount of One Million Dollars ($1,000,000.00); and the issues having been tried as to the remaining defendants, AmClyde , a Unit of AMCA International Corporation, and River Don Castings, Ltd.; and the jury having rendered its verdict on December 7, 1990, in favor of plaintiff and against defendants, for a total amount of Two Million, One Hundred Thousand Dollars ($2,100,00.00) with no pre-judgment interest, and thirty per cent (30%) fault allocated to plaintiff, McDermott, Inc., thirty-two per cent (32%) fault allocated to AmClyde, a Unit of AMCA International Corporation, and thirty-eight per cent (38%) fault allocated to River Don Castings, Ltd.; accordingly the Court enters its Judgment as follows:

It is hereby ORDERED that the jury verdict awarding total damages in the amount of Two Million, One Hundred Thousand Dollars ($2,100,00.00) with no pre-judgment interest, be reduced by thirty per cent (30%), reflecting that percentage of fault allocated to plaintiff, McDermott, Inc., for a total damages award of One Million, Four Hundred Seventy Thousand Dollars ($1,470,000.00). It is further

ORDERED that there be final judgment herein, pursuant to Rule 54 of the Federal Rules of Civil Procedure, in favor of plaintiff, McDermott, Inc., and against AmClyde, a Unit of AMCA International corporation, severally, for a total amount of Six Hundred Seventy-Two Thousand Dollars ($672,000.00). It is further

ORDERED that there be final judgment herein, pursuant to Rule 54 of the Federal Rules of Civil Procedure, in favor of plaintiff, McDermott, Inc., and against defendant, River Don Castings, Ltd., severally, for a total amount of Seven Hundred Ninety-Eight Thousand Dollars ($798,000.00). It is further

ORDERED that AmClyde, a Unit of AMCA International Corporation, take nothing under its Cross-Claim against McDermott, Inc., for the costs of replacing the hook used on the five thousand ton Shearleg crane. It is further

ORDERED that costs of these proceedings be allowed plaintiff as prevailing party pursuant to Rule 54 of the Federal Rules of Civil Procedure. Plaintiff will submit its taxable costs within twenty (20) days of the receipt of this order.

The Clerk shall enter this Order and provide a copy to all parties.

DONE at Houston, Texas, on this the 15th day of January, 1991.

/s/ George A. Kelt, Jr.
GEORGE A. KELT, JR.
United States Magistrate
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

McDERMOTT, INC., Plaintiff	§	C.A. H-88-2429
v.	§	FINAL JUDGMENT
CLYDE IRON, ET AL., Defendants	§	(Filed Feb. 5, 1991)

Judgment is entered against defendant Clyde Iron and River Don Castings in accordance with the Judgment signed on January 15, 1991. This cause is DISMISSED with prejudice as to Bridon Ropes, Ltd. (previously known as British Ropes, Ltd.), International Southwest Slings, Inc., and Hendrik Veder, B.V. only.

This is a FINAL JUDGMENT.

The Clerk shall enter this Order and provide a copy to all parties.

DONE at Houston, Texas, on this the 31st day of January, 1991.

/s/ George A. Kelt, Jr.
GEORGE A. KELT, JR.
United States Magistrate
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

McDERMOTT, INC.,	§	C.A. H-88-2429
Plaintiff	§	SUPERSEDING
	§	FINAL
v.	§	JUDGMENT
CLYDE IRON, ET AL.,	§	(Filed
Defendants	§	Mar. 14, 1991)

All motions seeking relief under Rules 50 and 59 of the Federal Rules of Civil Procedure are denied. It is hereby

ORDERED that a Final Judgment is entered in this case.

This is a superseding Final Judgment.

The Clerk shall enter this Order and provide a copy to all parties.

DONE at Houston, Texas, on this the 14th day of March, 1991.

/s/ George A. Kelt, Jr.
GEORGE A. KELT, JR.
United States Magistrate
Judge

RECEIPT, RELEASE AND SETTLEMENT AGREEMENT

WHEREAS, on or about 10 October 1986, at or in the vicinity of East Breaks Block 165, Gulf of Mexico, an accident occurred involving the 5000 Short Ton Shearleg Crane, its Main Hook, the SNAPPER/SOHIO deck section, and various cable laid slings used in the lift rigging, all of which was owned and/or operated by McDermott, Inc. resulting in physical damage to said property.

WHEREAS, McDermott, Inc. has made demand upon and filed suit against, inter alia, Bridon Ropes, Ltd. (previously known as "British Ropes, Ltd.), International Southwest Slings, Inc., and Hendrik Veder B.V. (all of said parties defendant being referred to, hereinafter, in globo, as "Sling Defendants") seeking recovery of $7,200,000.00 in damages plus interest, cost and fees wherein McDermott, Inc. alleges it has suffered as a result of the aforementioned accident, liability for which is in no way admitted or accepted by Sling Defendants; and

WHEREAS McDermott, Inc., Underwriters Subscribing to Policy No. MCD-1985-21 (Builder's Risk) and Underwriters Subscribing to Policy No. MCD-1986-1-A (Contractor's Equipment) and the Sling Defendants now wish to settle, adjust, and compromise their differences on the basis hereinafter set forth reserving unto McDermott, Inc., Underwriters Subscribing to Policy No. MCD-1985-21 (Builder's Risk) and Underwriters Subscribing to Policy No. MCD-1986-1-A (Contractor's Equipment) all rights against any and all parties other than the Sling Defendants specifically named herein and subscribing hereto.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS:

That for and in consideration of the full sum of ONE MILLION U.S.D. cash in hand paid by, for the account of, or on behalf of the Sling Defendants, it being agreed that of said sum, Bridon Ropes, Ltd. and those at interest therewith shall be responsible only for payment of U.S.D. 500,000, that International Southwest Slings, Inc. and those at interest therewith shall be responsible only for payment of U.S.D. 200,000, that Hendrik Veder, B.V. and those at interest therewith shall be responsible only for payment of U.S.D. 300,000, and it being further agreed that of that full sum U.S.D. 500,000 is allocated to McDermott, Inc. and Underwriters Subscribing to Policy No. MCD-1985-21 (Builder's Risk) for damages associated with the SNAPPER/SOHIO deck section and U.S.D. 500,000 is allocated to McDermott, Inc. and Underwriters Subscribing to Policy No. MCD-1986-1-A (Contractor's Equipment) for damages associated with the Shearleg Crane, the receipt and sufficiency of which is hereby acknowledged and due acquittance and discharge therefore granted, McDermott, Inc., Underwriters Subscribing to Policy No. MCD-1985-21 (Builder's Risk) and Underwriters Subscribing to Policy No. MCD-1986-1-A (Contractor's Equipment) do hereby release, remise, and forever discharge the Sling Defendants only, their agents, servants, employees, underwriters, officers, managers, directors, stockholders, subsidiary and affiliated corporations, successors, assigns, owners, charterers, operators, attorneys and insurance carriers of and from any and all rights, claims, liens, remedies, demands or causes of

action of whatever nature, for all damages, whether statutory, in contract or in tort, including but not limited to the physical damage to McDermott, Inc.'s property as set out above and any equipment, appurtenance, cargo, thing or person thereon, loss of use, production and/or profit, interest and any other related consequential and miscellaneous expenses which it has suffered, either directly or indirectly resulting from the accident of 10 October 1986 in which the Main Hook of the Shearleg Crane and a cable laid sling assembly failed, damaging the SNAPPER/SOHIO deck section and the Shearleg Crane, described above, whether under any contract or policy of insurance, whether at law, in equity, or in admiralty, or whether the same be now known or later discovered.

This sum and the terms set out hereinabove are also accepted in full settlement, satisfaction, discharge, and compromise of any and all claims against the Sling Defendants only made by or on behalf of McDermott, Inc. in that complaint filed in the United States District Court for the Southern District of Texas, Houston Division, entitled "McDermott, Inc. versus Clyde Iron, River Don Castings Limited, British Ropes Limited and International Southwest Sling Incorporated", bearing number H-88-2429, which complaint shall be dismissed with prejudice as of compromise, as to the above named Sling Defendants only and reserving to Plaintiff all rights and actions against any and all other parties, each party to this settlement to bear his or its own costs as a further term of this agreement.

McDermott, Inc., Underwriters Subscribing to Policy No. MCD-1985-21 (Builder's risk) and Underwriters and Subscribing to Policy No. MCD-1986-1-A (Contractor's

Equipment) hereby warrant that McDermott, Inc. is the sole owner and/or operator of the above described property and is the party entitled to assert any claim for damages to said property, including but not limited to any consequential damages, interest, fees or expenses out of the aforementioned accident. In further consideration of said payment, McDermott, Inc., Underwriters Subscribing to Policy No. MCD-1985-21 (Builder's Risk) Underwriters Subscribing to Policy No. MCD-1986-1-A (Contractor's Equipment) do hereby agree to indemnify, hold harmless, and defend all and singular, all of the parties and vessels released, from and against all claims, liens, demands or causes of action which hereafter may be asserted by any person, firm or corporation for the damage to the property aforementioned, including but not limited to any claims, demands or causes of action for contribution (whether in tort, in admiralty or statutory) arising from the damage to the property aforementioned including any claims, liens, or causes of action arising from the negligence, in whole or in part, if any, of the parties and vessels released herein, arising out of or resulting from the accident of 10 October 1986 described with particularity hereinabove.

For and in consideration of their respective contributions to and acceptance of this settlement, its terms, and conditions, McDermott, Inc., Underwriters Subscribing to Policy No. MCD-1985-21 (Builder's Risk) and Underwriters Subscribing to Policy No. MCD-1986-1-A (Contractor's Equipment) and the Sling Defendants only do hereby release, remise, and forever discharge each other, as well as their respective agents, servants, employees, underwriters, stockholders, managing agents, officers,

directors, subsidiary and affiliated companies,successors, assigns, owners, charterers, and operators from any and all claims, rights, liens, or causes of action which they have or may hereafter have, including but not limited to any and all claims for contribution or indemnity, legal or conventional, express or implied, civil or maritime, including any claim they might have against each other for attorneys' fees and expenses incurred on or before the date this receipt, release, and settlement agreement is signed, in connection with or as a result of the above described, particular accident of 10 October 1986 and resulting damages, whether the same be now known or hereafter discovered; except to the extent any term, condition, or provision of the preceding paragraph, then the term, condition or provision of the preceding paragraph shall control.

It is expressly understood and agreed by all parties to this receipt and release that the payment aforementioned is made purely by way of compromise and settlement and is in no way to be construed as an admission of liability on the part of any party hereto. It is further understood and agreed that this settlement, compromise, receipt and release applies only to the parties named herein and subscribing hereto and that McDermott, Inc. and/or Underwriters Subscribing to Policy No. MCD-1985-21 (Builder's Risk) and Underwriters Subscribing to Policy No. MCD-1986-1-A (Contractor's Equipment) reserve and retain all rights and actions against any and all other persons or parties.

IN EXECUTION AND WITNESS WHEREOF, we have hereunto set our hands, in original, this 11 day of January, 1991.

/s/ David J. Plavnicky
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ITEM NO. 25 SOHIO DECK CLAIM / REVISED - EX 11

	A	B	C	D	E	F	G	H	I	J	K	L
1		LABOR/BURD	CONT. LABOR	EQUIPMENT	OPERATING	G & A	INTEREST	MATERIAL	TOTALS	CLAIM INCOME	PROFIT	% PROFIT
2												
3												
4	MARINE DIVISION											
5	I-7018	27,380.70	0.00	231,383.06	38,580.64	36,310.94	34,440.00	1,346,062.09	1,714,157.43	2,082,223.13	368,065.70	17.68%
6												
7												
8												
9												
10	FABRICATOR DIV.											
11	13878	178,512.39	15,884.30	0.00	161,349.21	56,375.19	17,495.87	241,400.24	671,017.20	1,054,759.95	383,742.75	36.38%
12												
13												
14												
15	HUDSON ENG.											
16	18011	11,202.00	0.00	5,982.00	6,241.00	10,920.00	2,496.00	6,880.00	63,721.00	108,690.00	44,969.00	41.37%
17												
18												
19												
20	TOTALS:	237,095.09	15,884.30	237,365.06	206,170.85	103,606.13	54,431.87	1,594,342.33	2,448,895.63	3,245,673.08	796,777.45	24.55%
21												
22												
23	FINANCIAL											
24												
25												
26												
27												
28												
29	NOTE: CLAIM INCOME AS SHOWN DOES NOT REPRESENT MCDERMOTT'S FINANCIAL STATEMENTS ($2,674,752.67) , BUT RATHER THE AMOUNT RECOGNIZED PLUS											
30	ADDITIONAL INCOME WE ARE DUE FOR THIS CLAIM AS INDICATED ON SHEDULE OF CHARGES.											

RELIEF

ITEM NO. 24 SHEAR LEG CRANE / REVISED EX 10

	A	B	C	D	E	F	G	H	I	J	K	L
1	DESCRIPTION	LABOR/BURD	CONT. LABOR	EQUIPMENT	OPERATING	G &A	INTEREST	MATERIAL	TOTAL COST	CLAIM INCOME	PROFIT	% PROFIT
2												
3	MARINE DIVISION											
4	I-7019	511,860.39	0.00	55,032.04	127,997.98	117,845.01	0.00	1,275,754.65	2,088,490.07	2,831,439.02	742,948.95	26.24%
5												
6	FABRICATOR DIV.											
7	13879	85,279.33	200.00	1,670.40	70,948.05	24,788.78	7,693.02	59,069.12	249,648.70	725,525.50	475,876.80	65.59%
8												
9	SERVICES DIV.											
10	88325	0.00	0.00	0.00	0.00	0.00	0.00	18,654.98	18,654.98	16,958.76	(1,696.22)	-10.00%
11												
12	MCDERMOTT E & M											
13	95969	53,346.94	0.00	0.00	19,811.47	6,924.27	0.00	30,377.80	110,460.48	110,460.48	0.00	0.00%
14												
15	MCD INT. NORTH SEA	0.00	0.00	0.00	0.00	0.00	0.00	22,143.45	22,143.45	11,480.91	(10,662.54)	-92.87%
16												
17	B & W	4,459.90	0.00	0.00	9,365.80	0.00	0.00	2,518.10	16,343.80	16,343.80	0.00	0.00%
18												
19	HARVEY SUPPLY	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	440.38	440.38	100.00%
20												
21	MCD DUBAI	0.00	0.00	0.00	0.00	0.00	0.00	55,795.00	55,795.00	56,901.00	1,106.00	1.94%
22												
23	MAIN OFFICE	0.00	0.00	0.00	0.00	0.00	0.00	770.88	770.88	770.88	0.00	0.00%
24												
25												
26	TOTALS:	654,946.56	200.00	56,702.44	228,123.30	149,558.06	7,693.02	1,465,083.98	2,562,307.36	3,770,320.73	1,208,013.37	32.04%
27												
28												
29	NOTE: CLAIM INCOME AS SHOWN DOES NOT REPRESENT MCDERMOTT'S FINANCIAL STATEMENTS ($2,736,422.85), BUT RATHER THE AMOUNT RECOGNIZED PLUS											
30	ADDITIONAL INCOME WE ARE DUE FOR THE CLAIM AS INDICATED ON SCHEDULE OF CHARGES.											